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SAFE: RESTRICTIVE COVENANTS AND THE NEXT WAVE OF SEX OFFENDER LEGISLATION

Asmara M. Tekle*

ABSTRACT

This Article examines the emerging phenomenon and implications of sex offender covenants, the latest wave of sex offender legislation, under common law property rules such as touch and concern and the doctrine prohibiting restraints against alienation. The paper theorizes that courts use common law property rules to strike down personal “who” covenants, such as those based on race, age, disability, and often permanently debilitating sex offender status, that run afoul of public policy norms—most particularly, the wide availability of safe and decent housing for all.

The Article analogizes blanket sex offender covenants to their racially restrictive progenitors, arguing that both types of covenants are based on unsubstantiated fears that one population would sexually terrorize another. The modern-day fear is that convicted sex offenders will sexually prey upon children, whereas the underlying fear in the era of racial segregation was that black men, this country’s original sexual predators, would sexually prey upon infantilized white women. Finally, this Article looks to the sordid history of racial segregation for lessons and solutions to the modern-day problem of convicted sex offenders.

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INTRODUCTION

IN an elusive quest for security,¹ most people do not want convicted sex offenders for neighbors.² Consequently, developers, sensing residential real estate gold and homeowners and condominium associations concerned with residents' welfare, are increasingly employing the favored tool of neighborhood private legislation, the restrictive covenant,³ to achieve this end in many common interest communities (CICs).⁴ Indeed, certain subdivisions are being marketed as "sex offender free communities" and are wildly popular as a result.⁵

1. A. Dan Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 808 (1998) ("The practice of sorting people by homogeneous architecture and behavior rules," as is the norm in many common interest communities, "create[s] islands of security and tranquility in the midst of a rapidly changing society.").

2. This sentence stems from the first line of a law review article stating that "[m]ost white people do not want Negroes for neighbors." Arthur T. Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721, 721 (1934). The National Center for Missing and Exploited Children reports that there are 686,515 registered sex offenders in the United States (223 per 100,000 people). SPECIAL ANALYSIS UNIT, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, REGISTERED SEX OFFENDERS IN THE UNITED STATES PER 100,000 POPULATION 1 (2009), available at http://www.missingkids.com/en_US/documents/sex-offender-map.pdf; see also Sex Offender Registration and Notification Act, 42 U.S.C. § 16911(1) (2006) ("The term 'sex offender' means an individual convicted of a sex offense."). The label applies equally to the teen who has sex with his underage girlfriend, the permissive mother whose teen daughter is impregnated, the flasher, the pedophile, and the rapist of adult women. See *infra* notes 20, 27, and accompanying text.

3. See, e.g., Declaration of Covenants, Conditions, Restrictions, Easements Charges and Liens on and for Milwaukee Ridge, City of Lubbock, Texas, § 9.22 (Feb. 6, 2008) ("No registered sex offender (as defined in Chapter 62 of the Texas Code of Criminal Procedure) shall own or reside on any part of any Lot in the Addition The failure to comply with this restriction may, at the Association's option, subject the Owner to a fine of \$1000.00 per day for each day that such Owner fails to comply with this restriction."); Declaration re: Iris Park Subdivision and Iris Park Homeowners Association, Inc. § 22 (Dec. 11, 2006) (stating that "[i]n the event that the background check reveals the existence of a criminal history, defined by the information received, as sufficient to identify the person as a 'sex offender,' or having committed a 'sex offense,' whether or not that person is in compliance with local, state, or federal sex offender registration laws, the contract shall be rejected by the Association and shall not be accepted by the owner/seller of the property" and subjecting any resident who sells to a sex offender or attains the subsequent status of sex offender to a fine of \$1000 per day); Declaration of Covenants and Restrictions, Panther Valley, Allamuchy Township, Warren County, New Jersey Amended and Restated art. XII, § 1(a) (Dec. 16, 1998), available at <http://pvpca.org/pvpca.asp?CategoryName=Article%20XII> [hereinafter Panther Valley Declaration] (stating that no individual required to register his or her residence as a Tier III sex offender under New Jersey law "may permanently or temporarily reside in a Lot as an Owner, tenant, or under any other possessory interest"). Panther Valley's sex offender covenant was challenged in *Mulligan v. Panther Valley Property Owners Ass'n*, in which the Supreme Court of New Jersey upheld the homeowners association's amended covenant banning Tier III sex offenders, those deemed at highest risk of re-offending. 766 A.2d 1186, 1189-91 (N.J. Super. Ct. App. Div. 2001).

4. ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS 41 (1989) (stating that covenanted subdivisions create an extensive system of servitudes that may include rights of property access and use along with the imposition of obligations and/or charges relating to maintenance and repair and may also provide for the creation of a Property Owners Association).

5. Betsy Blaney, *Texas Developers Plan Sex Offender-Free Neighborhood in Lubbock*, ASSOCIATED PRESS, June 6, 2005, available at <http://www.lubbockonline.com/stories/>

Stories are legion about the extensive powers of many homeowners and condominium associations, known broadly as community associations, which regulate everything from house color⁶ to backyard vegetable gardens⁷ to kissing in the driveway⁸ in a quest for uniformity and a unique sense of community that some commentators have derided as inherently exclusionary.⁹ This Article squarely confronts the issue of whether a community association's power extends to regulating the sex offender as neighbor and, specifically, as owner or occupier, under common law property rules.

The weapon of choice in this private battle pitting neighbor against sex offender is the restrictive covenant, an implement well-tested in the neighborhood battles of yore—skirmishes that often placed African-American, Asian-American, Jewish, and Mexican-American newcomers in opposition to incumbent white residents.¹⁰ The implement came into vogue after the Supreme Court, in *Buchanan v. Warley*, struck down nu-

060605/LOC_060605029.shtml ("The sales pitch for a planned subdivision [in Lubbock, Texas,] promises safety: criminal background checks for homeowners and, guaranteed, no convicted sex offenders."); Internet Broadcasting Systems, Inc., *New Subdivisions Ban Sex Offenders from Moving In*, June 13, 2006, available at <http://www.theindychannel.com/family/9362047/detail.html> (reporting that an additional sex offender free subdivision was being planned outside of Kansas City, Missouri, and that the developer's similar development in Lubbock, Texas, "has nearly sold out in nine months"); see also KWTX, *Amarillo Subdivision Looks to Ban Sex Offenders*, Nov. 23, 2007, <http://www.kwtx.com/home/headlines/11756576.html>; *Texas: Sex Offenders Barred From Subdivision*, N.Y. TIMES, Nov. 24, 2007, at A11, available at http://www.nytimes.com/2007/11/24/us/24brfs-SEXOFFENDERS_BRF.html (noting that the same developer had "barred convicted sex offenders from owning or living in any new home" in the same Amarillo development).

6. Timothy Egan, *The Serene Fortress: A Special Report; Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, at 1, available at <http://nytimes.com/1995/09/03/us/the-serene-fortress-a-special-report-many-seek-security-in-private-communities.html> (stating that several committees in Bear Creek, a high-end private community outside of Seattle, Washington, regulate "everything from house colors . . . to whether basketball hoops can be attached to the garage").

7. EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 13 (1994) (stating that one of the largest common interest developments at the time, the private community of Rancho Bernardo, which is located outside of San Diego, California, regulates "[e]ven vegetable gardens" (quoting RICHARD LOUV, *AMERICA* II 80 (1983))).

8. *Id.* at 17-18 (quoting Editorial, *Kissing and Doing Bad Things: Grandmother Feels Lash of Intrusive Condominium Association*, L.A. TIMES, June 21, 1991, at B6).

9. See, e.g., David L. Callies et al., *Ramapo Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177, 183 (2003) ("All three categories of gated communities reflect several principal social values: (1) a sense of community, (2) exclusion, and (3) privatization.").

10. See *Shelley v. Kraemer*, 334 U.S. 1, 5 (1948) (striking down a restrictive covenant, which provided that for fifty years no part of the property should be occupied by people of the "Negro or Mongolian Race," because enforcement of the covenant in state court would constitute a state action); *Gandolfo v. Hartman*, 49 F. 181, 183 (C.C.S.D. Cal. 1892) (declaring a covenant not to convey or lease land to a "Chinaman" void and contrary to public policy); *Clifton v. Puente*, 218 S.W.2d 272, 273-74 (Tex. Civ. App.—San Antonio 1949, writ ref'd n.r.e.) (refusing to enforce a restrictive covenant that prohibited the sale or lease of property to persons of Mexican descent); *In re Wren*, [1945] 4 D.L.R. 674, 674 (Can.) (declaring a covenant that prohibited the sale of land to Jews or persons of objectionable nationality void and contrary to public policy). In addition, racial and ethnic residential segregation was not unique to the United States. For instance, during the Middle Ages, Jews were publicly restricted in many parts of Europe to "ghettoes," and Ireland histori-

merous public efforts to zone racial groups into certain areas of the city,¹¹ a response to the waves of southern blacks flooding northern and western cities in the Great Migration in search of greater economic opportunity.¹² The racially restrictive covenant, which was promulgated by independent neighborhood associations, proved to be the next frontier in white urban America's efforts to secure racial homogeneity and to repel a residential "negro invasion."¹³ In a similar vein, this Article theorizes that the next wave of sex offender legislation may well occur in the private clubhouses and living rooms of America's master-planned, gated, and condominium communities in lieu of the very public forum of the legislature. The public policy implications of this privately helmed next wave may be severe.

Americans are increasingly calling CICs their home. For example, in 1970, only 2.1 million individuals resided in these communities, whereas 59.5 million people in 300,800 communities called these neighborhoods home in 2005.¹⁴ Moreover, these communities, once arguably the sole

cally banned native Celts from living outside certain areas or beyond the "Irish pale." T. B. Benson, *Segregation Ordinances*, 1 VA. L. REG. 330, 330 (1916).

11. 245 U.S. 60, 82 (1917) (holding that an "attempt to prevent the alienation of the property . . . to a person of color was not a legitimate exercise of the police power of the state" and was violative of the Fourteenth Amendment, which prevents "state interference with property rights except by due process of law"); see also Carol Rose, *Property Stories: Shelley v. Kraemer*, in PROPERTY STORIES 189, 193-94 (Gerald Kornguld & Andrew P. Morriss eds., 2d ed. 2009) (noting that several other cities enacted public zoning of racial groups, including Baltimore, Maryland, which, in 1910, was the first major city to enact a racial zoning ordinance); Warren B. Hunting, *The Constitutionality of Race Distinctions and the Baltimore Negro Segregation Ordinance*, 11 COLUM. L. REV. 24, 24 (1911) (discussing the criminalization of "any white person to take up his residence in a negro block, or a negro in a white block").

12. See Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 739 (1989) ("Racially restrictive covenants were prompted, in large measure, by the great migration of black families from rural areas to northern and midwestern industrial centers. The migration from field to factory began in the second decade of the twentieth century and reached its peak during the Second World War.").

13. Andrew A. Bruce, *Racial Zoning by Private Contract in the Light of the Constitution and the Rule Against Restraints on Alienation*, 21 ILL. L. REV. 704, 716 (1927); see also Ware, *supra* note 12, at 738 ("The great migration of black families from rural areas to urban industrial centers prompted various efforts to establish and maintain racial segregation in housing. After legislated segregation failed, private covenants became the primary vehicle for maintaining segregated housing."). The Supreme Court upheld racially restrictive covenants in *Corrigan v. Buckley*, reasoning that federal constitutional restraints such as the Fifth and Thirteenth Amendments, which would otherwise apply to public zoning, were inapplicable to prohibit "private individuals from entering into contracts respecting the control and disposition of their own property." 271 U.S. 323, 330 (1926). Under the state action principle defined by the Court in *Shelley v. Kraemer*, 334 U.S. at 23, racially restrictive covenants were subsequently struck down, more than twenty years later.

14. Community Associations Institute, *Community Association Data 1970-2008*, <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Aug. 29, 2009). Indeed, almost twenty percent of all U.S. residential real estate, totaling approximately four trillion dollars, is governed by community associations. *Id.* Frank Ratham, Vice President of Communications and Public Relations for the Community Associations Institute, indicates that the vast majority of community homes built in the last fifteen to twenty years are governed by a community association. Telephone Interview by Joely Stewart with Frank Ratham, Vice President of Commc'ns & Pub. Relations, Cmty. Ass'ns Inst. (Aug. 28, 2008).

province of the wealthy, have crossed economic strata into the middle-class, and for many families they are the only affordable housing choice.¹⁵

To be sure, this next wave of private sex offender legislation may likely be the coda to all or most sex offender legislation, given that little else can be done to rid society of the “scourge” posed by this population.¹⁶ Indeed, this next wave may follow in the wake of increasingly severe sex offender restraints that began with registration requirements, progressed to community notification mandates, and currently are manifest in public residency restrictions banning the convicted sex offender from living anywhere between 500 and 2,500 feet of a school, child care center, park, or other child-friendly sites.¹⁷

Public residency restrictions have been criticized as being dangerously overinclusive by incentivizing the behavior against which they were designed to guard.¹⁸ These restrictions relegate convicted sex offenders to society’s physical and psychological margins in the cornfields of Iowa, the underpasses of Miami, the industrial areas of cities, the woods of Georgia, or the bed of a dried-up river in California¹⁹ without regard to future

15. See Callies et al., *supra* note 9, at 180 (“Once considered the domain only of the most affluent, today[,] CICs represent the main staple of suburban and metropolitan residential development. In particular, the demand for gated and walled communities has risen both in suburban and urban areas across diverse economic strata.”); see also MCKENZIE, *supra* note 7, at 11-12 (noting that common interest developments have “become the norm for new housing” in many areas of the country, which restricts consumer choice); Egan, *supra* note 6 (“What is different now is that a big portion of middle-class families, in nonretirement, largely white areas of the country, have chosen to wall themselves off, opting for private government, schools and police.”). In addition, according to the latest studies, much of the CIC development is concentrated, first, in the Sunbelt states of California, Florida, and Texas; and second, in New Jersey, New York, Virginia, Pennsylvania, Maryland, and Hawaii. *Id.* at 11 (citing a 1989 national survey by the Advisory Committee on Intergovernmental Relations (ACIR)); see also Telephone Interview with Joely Stewart with Frank Ratham, *supra* note 14 (stating that, although he has not collected data regarding income, he believes that members of community associations have a wide range of incomes because most homes built in the last fifteen to twenty years are governed by community associations).

16. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1887 (2006) (underscoring the extent to which convicted sex offenders are “universally loathed” and the notion that they represent modern-day America’s “least desirable neighbors of all,” who are singled out for “harsher post-release restrictions than [even] murderers”).

17. See Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 610 nn.5-7, 613 n.19 (2009) (describing the evolution of convicted sex offender legislation); Karl Vick, *Laws to Track Sex Offenders Encouraging Homelessness*, WASH. POST, Dec. 27, 2008, at A03 (noting that California’s Proposition 83, passed in November 2006, prevents convicted sex offenders from living within 2,000 feet of a school or park).

18. See *infra* note 20.

19. Tekle-Johnson, *supra* note 17, at 621-22 nn.52-57; see also Damien Cave, *Roadside Camp for Miami Sex Offenders Leads to Lawsuit*, N.Y. TIMES, Jul. 10, 2009, available at <http://www.nytimes.com/2009/07/10/us/10offender.html> (describing Julia Tuttle Bridge in Miami-Dade County as a place where “[a]t least 70 convicted sex offenders live . . . now, in a shantytown on Biscayne Bay with trash piles clawed by crabs. It has become what even law enforcement officials call a public-safety hazard, produced by laws intended to keep the public safe.”); see also *Homeless Ga. Sex Offenders Directed to Woods*, N.Y. TIMES, Sept. 28, 2009, <http://www.nytimes.com/aponline/2009/09/28/us/AP-US-Sex-Offender-Camp.html> (“A small group of homeless sex offenders have been ordered to move from a

levels of dangerousness, the original offense, or the displacement of support and employment mechanisms, such as jobs, transportation, family, and care that could prevent recidivism.²⁰

Much of this extreme punishment directed towards the convicted sex offender is predicated on the erroneous belief that this offender, unlike all others, is destined to reoffend against children.²¹ In fact, ninety-three percent of sex crimes against children are committed by family members or acquaintances of the child.²² In addition, empirical evidence suggests that, comparatively, sex offenders are among the least likely to recidivate in the criminal offender population.²³ Sadly, the exclusive focus on the

makeshift camp in a densely wooded area behind a suburban office park. The sex offenders had been directed to the camp by probation officers . . . [who] said it was a location of last resort for the sex offenders who are barred from living in many areas by one of the nation's toughest sex offender policies. . . . [Cobb County Sheriff Neil] Warren said he did not know where the sex offenders would go next."); Vick, *supra* note 17 (stating that, because of California's sex offender residency regime, a convicted rapist on post-conviction release "ended up in a tent on the dry bed of the Ventura River").

20. Tekle-Johnson, *supra* note 17, at 613 nn.15-18; see also Vick, *supra* note 17 (noting that groups ranging from the National Center for Missing and Exploited Children, the California Coalition on Sex Offending, the Iowa County Attorneys Association, and the California Sex Offender Management Board have decried sex offender residency regimes as "well-intentioned failure[s]," ineffective, and constituting unsound public policy). The article goes on to quote Detective Diane Webb, a Los Angeles Police Department supervisor of the unit tracking the 5,000 sex offenders in Los Angeles County, as stating that "[t]he public was definitely sold a bill of goods on this one." *Id.* Similarly, public residency restrictions on sex offenders have been critiqued as violations of the federal Ex Post Facto Clause, largely because few regimes distinguish between types of sex offenders, lumping the serial pedophile with the flasher, the permissive mom, or the mature adolescent. Tekle-Johnson, *supra* note 17, at 616-17, & n.20.

21. Tekle-Johnson, *supra* note 17, at 611 & n.12.

22. See HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 tbl.6 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrlrle.pdf> (culling the Uniform Crime Reporting Program's National Incident-Based Reporting System's master files for the years 1991 through 1996); see also Vick, *supra* note 17 (citing Justice Department statistics, which "show that ninety-three percent of child victims are molested by someone they know" and quoting Professor Jill Levenson, an expert on sex offenders, as saying that "[t]here's this mythology that you have to know who this scary man is in the neighborhood that might hurt your child, when the reality is that sex offenders are often people we know and love").

23. See Lisa Sandberg, *Unlikely Force Fighting Sex Crime's Stigma: Texas Voices Wants Laws to Note Difference Between Dangerous Predators, Nonviolent Offenders*, HOUSTON CHRON., Dec. 13, 2008, available at <http://www.chron.com/disp/story.mpl/metro-politain/6163587.html>. "According to a 2003 U.S. Justice Department study, roughly 5 percent of sex offenders released from prison were rearrested for another sex crime within three years, a recidivism rate lower than for many other types of crimes." *Id.* This study tracked 9,691 men whose crime was a violent sex offense, including a sex offense against a minor, and who were released from state prisons in fifteen states for three years (encompassing two-thirds of all male sex offenders released in 1994) and measured their recidivism rates, determined by rates of rearrest, reconviction, and reimprisonment. PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>. In some instances, the study compared the 9,691 male sex offenders to the 272,111 total prisoners released in 1994. *Id.* The male sex offenders constituted 3.6% of all releases. *Id.* Of the released sex offenders, 5.3% were rearrested for a violent sex crime, although the study's authors acknowledge a likely undercount of 1.0% and a figure closer to 6.6%. *Id.* at 24, 38. This results in a 3.5% rate of reconviction for a violent sex crime. *Id.* at 2. In

wide universe of individuals labeled as convicted sex offenders distracts from the overwhelming majority of perpetrators of child sex abuse—family and friends—perhaps because these individuals remain uncomfortably close to home.

Despite their growing relevance and popularity as a result of increasingly harsh public residency constraints on convicted sex offenders and the heightened tension surrounding this population, private residency regimes have largely remained unexplored in the academic literature.²⁴ However, public safety demands effective public policy, especially in jurisdictions where public restrictions are already in place, and convicted sex offenders are arguably foreclosed from even more housing opportunities. Similarly, public policy requires that the social costs of housing convicted sex offenders be shared and that no community, public or private, be permitted to opt out. This Article further argues that the common law has played an underappreciated role in checking overreaching private restrictions that cumulatively make for unwise public policy.

Accordingly, Part I lays the groundwork for this argument by discussing the common law property doctrines historically applicable to restric-

addition, while non-sex offenders had only a 1.3% rearrest rate for a violent sex crime, “[r]eleased sex offenders accounted for 17% and released non-sex offenders accounted for 83% of the 1,251 sex crimes against children committed by all the prisoners released in 1994.” *Id.* at 31. In addition, the study showed that 43% of the released sex offenders were rearrested for a crime of any kind, as compared to 68% of non-sex offenders. *Id.* at 14. Of the rearrest charges for the sex offenders, 75% were felonies, as compared to 84% for the non-sex offenders. *Id.* Finally, 24% of the sex offenders, as compared to 47.8% of the non-sex offenders, were reconvicted for crime of any kind. *Id.*; see also Michelle L. Meloy, *The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors, and Deterrence of Sex Offenders on Probation*, 16 CRIM. JUST. POL’Y REV. 211, 233 n.8 (2005); Carl Bialik, *Underreporting Clouds Attempt to Count Repeat Sex Offenders*, WALL ST. J., Jan. 25, 2008, at B1 (“Among convicted criminals released from prison, sex offenders released from prison are less likely to be arrested for any new crime than most other offenders.”); Vick, *supra* note 17 (“Clinicians say the odds of an individual re-offending can be predicted with reasonable confidence by assessments that take into account age, offense, history and other variables. In the entire population of sex offenders, clinicians say, about 15 percent bear close watch.”); CTR. FOR OFFENDER MGMT., U.S. DEP’T OF JUSTICE, MYTHS AND FACTS ABOUT SEX OFFENDERS 3 (2000), available at <http://www.johnhoward.ca/trends/mythsfacts.pdf> (“It is noteworthy that recidivism rates for sex offenders are lower than for the general criminal population.”). Professor Meloy notes that:

Sex offender legislation does not target the most common and most high-risk sex crime scenarios (i.e., date rape, adult female victims, and child molestation cases involving perpetrators who often know the victim intimately). Rather, sex offender registration/community notification, for example, is designed almost exclusively to protect children from stranger assailants, a statistically rare occurrence.

Meloy, *supra*, at 233 n.8.

24. The issue has received cursory attention in a student-written comment that floated the notion of whether sex offender covenants violate the common law property norms prohibiting restraints on alienation, the reasonableness test, and public policy. John J. Herman, Comment, *Not in My Community: Is It Legal for Private Entities to Ban Sex Offenders from Living in Their Communities?*, 16 WIDENER L.J. 165, 171-76 (2006). In addition, one blog posed the question whether “Pedophile-Free Associations” were the “Wave of the Future or Unconstitutional?” Posting of Elysa D. Bergenfeld to New Jersey Law Blog, <http://www.njlawblog.com/2006/07/articles/community-associations/pedophilefree-associations-the-wave-of-the-future-or-unconstitutional/> (July 6, 2006, 08:45 EST).

tive covenants generally: (1) touch and concern, (2) the rule prohibiting restraints on alienation, (3) the principle proscribing unreasonable covenants generally, and (4) the precept precluding covenants that contravene public policy.²⁵ It introduces the concept of “who” covenants, covenants based on personal and largely immutable characteristics and often an unsubstantiated fear resulting from these characteristics.²⁶ It also uses prior “who” covenants, such as those based on race and ethnicity, age, disability, pet-ownership, quasi-religious affiliation, and even Yankee origins, as touchstones of analysis in the discussion of common law property doctrines to theorize that courts have used the common law to terminate “who” covenants that run afoul of public policy. In no way, however, does this Article equate convicted sex offenders with racial and ethnic groups that have been the targets of racially restrictive covenants, such as individuals of African, Latin, and Asian descent, or with disabled individuals who have been affected by single-family use covenants; rather, the Article equates the public policy effects of “who” covenants, as private land-use devices, on these once or currently marginalized populations.

Part II then turns its attention squarely to sex offender covenants and applies the common law property doctrines to them. It posits that these latest iterations of “who” covenants are generally more akin in their public policy effects to their racially restrictive and disability-based antecedents. They foreclose housing opportunities and concentrate the social costs of housing sex offenders to certain areas and populations that may lack the powerful implement of the restrictive covenant. This part subsequently asserts that sex offender covenants should be struck down under the common law unless they are narrowly tailored to focus on the most dangerous convicted sex offenders, a determination based on original offense or future risk of dangerousness.²⁷

25. Because this paper analyzes sex offender covenants under the common law property doctrines, which are largely still in effect in many jurisdictions, the examination of these covenants under the *Restatement (Third) of Property* is beyond the scope of this paper. Though calling for the elimination of the formative common law property doctrines of touch and concern and unreasonable restraints on alienation, the *Restatement (Third)* recommends the termination of restrictive covenants that substantively violate public policy. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1-6 (1998). This conclusion is in keeping with this Article's thesis that courts use common law property rules to assess whether “who” covenants conform to or violate public policy and to uphold or to strike down these covenants based on an assessment derived from public policy.

26. The term “who” covenant derives from Carol Rose's work. See Rose, *supra* note 11, at 198 (“A constraint on *who* can buy land, as opposed to what uses they can make of it, must have seemed peculiarly troublesome [with respect to applying the common law property doctrine prohibiting restraints on alienation to racially restrictive covenants].”).

27. See R. KARL HANSON & ANDREW HARRIS, DEP'T OF THE SOLICITOR GEN. CAN., DYNAMIC PREDICTORS OF SEXUAL RECIDIVISM 21, 25, 26 (1998), available at <http://www.static99.org/pdfdocs/hansonandharris1998.pdf> (examining the effect of dynamic risk factors on the recidivism rates of almost 400 sex offenders in Canada, who were evenly divided between rapists, child molesters of boys, and child molesters of girls); see Robert F. Worth, *Exiling Sex Offenders from Town; Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1 (reporting that “pedophiles . . . have recidivism rates of more than 50 percent”); Panther Valley Declaration, *supra* note 3.

Part III places sex offender covenants in historical context by arguing that, like their racially restrictive progenitors, they are based on unsubstantiated fears contravened by empirical evidence that all convicted sex offenders will sexually prey upon children. In the era of the racially restrictive covenant, the underlying and unsubstantiated fear was that black men, this country's original sexual predators, would sexually terrorize infantilized white women. It then concludes by reflecting on the lessons and solutions to the sex offender problem offered by the sordid history of racial segregation.

I. LAYING THE FOUNDATION: COMMON LAW PROPERTY RULES AND PRIOR "WHO" COVENANTS

Sex offender covenants follow a long line of prior "who" covenants, those grounded in personal and largely immutable characteristics and often unsubstantiated fear. The paradigmatic "who" covenant is the racially restrictive covenant. In more recent years the classification has expanded to include age, disability, pet, quasi-religious, and even Yankee covenants. Individual common law property doctrines have been used to uphold or to invalidate each type of covenant. However, this Article asserts that the overarching principle guiding the common law's examination of "who" covenants is whether they conform to current norms of public policy.

A. TOUCH AND CONCERN

In order for restrictive covenants "to run with the land," or to pass to successive owners, the common law has historically required that covenants touch and concern the land.²⁸ The doctrine's purpose was to ensure that maximum utility was gleaned from real property²⁹ and to prevent the attachment of unduly personal promises to land that would inhibit its use by successive owners.³⁰ The touch and concern analysis has traditionally been a minefield, distinguished by a vague set of principles that undergird

28. *Runyon v. Paley*, 416 S.E.2d 177, 182-83 (N.C. 1992).

It is well established that an owner of land in fee has a right to sell his land subject to any restrictions he may see fit to impose . . . Such restrictions are often included as covenants in the deed conveying the property and may be classified as either personal covenants or real covenants that *are said to run with the land* . . . A restrictive covenant is a real covenant that runs with the land . . . only if (1) the subject of the covenant *touches and concerns* the land . . .

Id. (emphasis added).

29. Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 150 (1978).

30. Michael J.D. Sweeney, Note, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 FORDHAM L. REV. 661, 673 (1995) (stating that the purpose of the touch and concern requirement is to "prevent the attachment of personal obligations to land that may defeat efficient allocation and to control unreasonable affirmative burdens and externalities that arise from servitudes").

it.³¹ However, unanimity has been achieved by dividing the touch and concern analysis into (1) the benefit posed by the restrictive covenant; and (2) the burden that the covenant poses.³²

On the *benefit* side, a restrictive covenant runs with the land when it increases the value or enjoyment of the beneficiary's land.³³ Similarly, the *burden* of a restrictive covenant touches and concerns the land when it "bear[s] some relationship (exactly what kind of relationship is not always clear) to the use and enjoyment of property."³⁴ In covenanted subdivisions, including many CICs with residential community associations, the burdens and benefits of mutual covenants attach to the ownership of each parcel of land.³⁵

1. Property Value

Evocative of the arguments used to uphold sex offender covenants were those used to support pre-*Shelley* racially restrictive covenants as value-maximizing devices that maintained, if not increased, property values.³⁶ These covenants were bold attempts to maintain the urban "fortresses of whiteness" against the encroaching "black belts," or enclaves of black Americans who had migrated to points north and west as part of the Great Migration.³⁷ A common argument was that many white individuals could not countenance residing in a neighborhood with a critical mass of black individuals, resulting in the decline of property values relative to white buyers, a situation that arguably still exists even today.³⁸

31. See Tarlock, *supra* note 1, at 811 ("There is a widespread consensus among commentators that the rule is vague and, therefore, impossible to reduce to a single, uniform test."); see also Runyon, 416 S.E.2d at 183 ("As noted by several courts and commentators, the touch and concern requirement is not capable of being reduced to an absolute test or precise definition.").

32. See Runyon, 416 S.E.2d at 183 (describing the touch and concern requirement as requiring the judiciary to concentrate "on the nature of the burdens and benefits created by a covenant," to determine if the covenant runs with the land (citing CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 96 (2d ed. 1947))).

33. *Id.*

34. NATELSON, *supra* note 4, at 52.

35. *Id.* at 50.

36. Ware, *supra* note 12, at 771 ("The redistribution of the black population from rural to urban areas, and the availability of jobs in a growing industrial economy, assured that the rapid growth of black populations in cities could not be contained physically within the tiny districts to which they were confined by the covenants."); see also Rose, *supra* note 11, at 208-09 (identifying three responses to the encroachment of blacks into "new locations" as a result of the severe overcrowding or black urban ghettos: (1) violence; (2) white flight; and (3) racially restrictive covenants).

37. Bruce, *supra* note 13, at 716 (referring to white areas that "might become entirely surrounded by a black belt"); see *supra* note 36.

38. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 446 (2006) ("Caucasians who purchase homes in a new development that ultimately tips toward African American composition will incur substantial economic costs as a result. Real estate has historically appreciated much more quickly in all-white neighborhoods than in neighborhoods that have a ten percent African American population, and noticeably more quickly in ten percent African American neighborhoods than in twenty percent African American neighborhoods."); see Rose, *supra* note 11, at 204 ("Real

Viewed from this perspective, therefore, these covenants ran with the land on the benefit side because they protected real property values relative to white buyers.

On the other hand, while white individuals may have been less inclined to reside in a neighborhood that left them bereft of the property-value protection afforded by the racially restrictive covenant, black individuals' demand for these same neighborhoods was astronomical and commanded extremely high prices.³⁹ A large pool of black buyers was desperate to escape the overcrowded conditions of the ghetto.⁴⁰ Therefore, relative to black buyers, racially restrictive covenants arguably decreased land values, in contravention of the free market and the demands of the benefit side of the touch and concern equation.

2. *Enjoyment*

Reminiscent of arguments supporting sex offender covenants,⁴¹ private and public racially restrictive zoning pre-*Shelley* and pre-*Buchanan* were largely premised on the notion that they would promote racial peace and social harmony, thereby increasing beneficiaries' enjoyment.⁴² More pointedly, and in keeping with the era, racially restrictive zoning may have alleviated white individuals' discomfort with sharing some of their most private spaces, their neighborhoods, with people of color. Viewed from this perspective, therefore, racially restrictive covenants satisfied the benefit side of the touch and concern analysis by increasing the enjoyment of white beneficiaries.

In the 1980s, a similar line of reasoning was used to support the public zoning of group homes for the mentally challenged in *City of Cleburne v. Cleburne Living Center*.⁴³ Indeed, the City of Cleburne argued that the zoning ordinance should be upheld because it mitigated harassment towards this vulnerable population, another version of the pre-*Buchanan*

estate professionals found evidence that the presence of African Americans of [sic] other nonwhite minorities diminished the property values for whites . . .").

39. Ware, *supra* note 12, at 742.

40. *Id.* ("Because the demand for housing in black communities was far greater than the available supply, white homesellers frequently obtained substantially higher prices from black purchasers than they would have received from white buyers. As a result, despite the elaborate mechanisms that were created to perpetuate segregated communities, white homeowners and real estate agents had a significant economic incentive to sell properties to black purchasers."); see also Bruce, *supra* note 13, at 704.

41. See *infra* notes 185-86 and accompanying text.

42. *Buchanan v. Warley*, 245 U.S. 60, 70, 82 (striking down a municipal ordinance designed "to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by . . . requiring . . . the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively," and declaring the ordinance an illegitimate exercise of the state's police power in violation of the U.S. Constitution).

43. 473 U.S. 432, 433, 448 (1985) (holding a city ordinance that required a special use permit for a proposed group home invalid under the rational basis test of the Equal Protection Clause because the record contained no "rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests").

social harmony argument.⁴⁴ While *Cleburne* concerned restrictions in public zoning, the takeaway in the private zoning context is significant because it explicitly repudiated the argument that an unfounded fear of the mentally challenged was sufficient to restrict this population from residing in certain areas.⁴⁵ Similarly, *Shelley* arguably implicitly rejected whites' similarly unfounded fear of living in close proximity to people of color.⁴⁶ In other words, though there may be some marginal benefit to certain populations with respect to land values and "enjoyment," race- and disability-based "who" restrictions that are grounded in unsubstantiated fear serve no real benefit to the use and enjoyment of land under touch and concern analysis.⁴⁷

B. RESTRAINT AGAINST ALIENATION

1. Background

In addition to the touch and concern requirement, the common law of property also prohibits restraints against alienation, or constraints on transferring ownership interests in real property.⁴⁸ The reasons for this doctrine are several. First, the smaller the pool of potential purchasers, the lower a property's resale value is likely to be.⁴⁹ Paradoxically, by restraining the number of buyers, restrictions may also "concentrate wealth" by keeping "property out of commerce."⁵⁰ Restrictions on alienation may also prevent the ability of creditors to satisfy claims.⁵¹

In addition, a restricted pool of buyers decreases the incentive for ex-

44. *Id.* at 449.

45. *See id.* at 450 (commenting that the special use requirement was based on "irrational prejudice" towards the mentally challenged); *id.* at 448 (noting that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from" other group dwellings).

46. The Court achieved this aim by relying on the dubious "state action" doctrine to strike down the restrictions. *See* William P. Marshall, *Diluting Constitutional Rights: Rethinking 'Rethinking State Action'*, 80 NW. U. L. REV. 558 (1985) ("The state action doctrine has been soundly criticized for being hopelessly confused and inconsistent. Commentators argue that the public/private distinction of the state action doctrine has been wrongly and perhaps disingenuously applied by the Supreme Court in order to avoid the substantive constitutional inquiry."). *But see* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 86 (2002) ("Although the state action doctrine has a dubious constitutional pedigree, the Court has reaffirmed it so often and recently that its continuing authority cannot really be doubted.").

47. *See supra* notes 36-46 and accompanying text; *see also* Sweeney, *supra* note 30, at 672 (discussing extremely personal promises). The burden analysis of the touch and concern doctrine is similar to that regarding benefit. *See supra* notes 33-34 and accompanying text. As on the benefit side, because racially restrictive covenants are grounded in personal and immutable characteristics, they bear little relationship to the use and enjoyment of land because their benefit derives not from a use of land, but from who lives on it and because they are unduly personal. *See supra* notes 36-46 and accompanying text.

48. *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App. 152, 175 (Cal. Dist. Ct. App. 1919).

49. Rose, *supra* note 11, at 198.

50. *Gale v. York Ctr. Cmty. Coop., Inc.*, 171 N.E.2d 30, 33 (Ill. 1960).

51. *Id.*

isting owners to improve or maintain real property,⁵² given that the land may be more difficult to sell. This underinvestment causes a snowball effect to occur on existing properties in the area, resulting in broader "neighborhood deterioration" and "genuine social impact."⁵³

On the other hand, certain restrictions that "are valuable to a substantial class of bidders," such as noise and residential-only use restraints, may "offset" this underinvestment by increasing opportunities for resale.⁵⁴ However, as Professor Rose points out, although these kinds of restraints may be intrinsically valuable, courts were particularly vexed during the era of racially restrictive covenants by the issue of whether to uphold "who" covenants in comparison to their "use" counterparts.⁵⁵

Historically, the common law preferred the certainty of forbidding *any* restraint on alienation, even though it may have been limited in duration, class of persons affected, or present or future property interest.⁵⁶ This bright-line rule was used to address the difficulty in ascertaining the "dividing line" between an unreasonable and void restraint and one that may be upheld.⁵⁷ Therefore, under this bright-line rule, many sex offender covenants would be impermissible restraints on alienation because they endure indefinitely.⁵⁸

2. *The Reasonableness Test on Alienation*

a. Class Size as Measure

In the modern day, the old bright-line rule has ceded place to one that emphasizes reasonableness.⁵⁹ Often, the class size of potential purchasers is the dominant factor in assessing whether a real property covenant is

52. Rose, *supra* note 11, at 198; *see also* Gale, 171 N.E.2d at 33 (noting that restraints on alienation "may deter the improvement of the property").

53. Rose, *supra* note 11, at 198.

54. *Id.*

55. *Id.* at 198-99 (noting that courts in Louisiana and Missouri had held that racially restrictive covenants offset any resale values of properties by "leaving a large enough pool of buyers even after the exclusion of non-Caucasians," while courts in California and Michigan determined that restraints barring ownership on racial grounds violated the rule against alienation).

56. Gale, 171 N.E.2d at 33; *see also* Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 158 (Cal. Dist. Ct. App. 1919) ("We think that, on principle, any restraint on alienation, either as to persons or time, is invalid."); *see also* NATELSON, *supra* note 4, at 49 (stating that contractual servitudes "may offend the rule against unreasonable restraints on alienation").

57. Title Guarantee, 42 Cal. App. at 160.

58. *See supra* note 3. None of the regimes has a time limit.

59. *See, e.g.,* Taormina Theosophical Cmty., Inc. v. Silver, 140 Cal. App. 3d 964, 973 (Cal. Ct. App. 1983) ("[I]t is now settled that only unreasonable restraints are invalid."); Laguna Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 682 (Cal. Ct. App. 1981) ("The day has long since passed when the rule in California was that all restraints on alienation were unlawful under the statute; it is now the settled law in this jurisdiction that only unreasonable restraints on alienation are invalid."); NATELSON, *supra* note 4, at 594-608 (discussing the reasonableness of restraints in a cooperative setting, such as a condominium, when based on the shared interests of the owners).

a reasonable restraint on alienation.⁶⁰

i. Quasi-Religious Covenants: *Taormina*

In *Taormina Theosophical Community, Inc. v. Silver*, a California appellate court declined to sustain a real-property covenant in southern California⁶¹ that restricted purchasers in three ways: (1) the purchasers had to be members of the Theosophical Society⁶² for three years; (2) if they had not been members for this period of time, then their purchase was subject to approval by the community association's Board of Trustees; and (3) purchasers had to be at least fifty years of age.⁶³ The court concluded that these restrictive criteria reduced the class size of potential purchasers to infinitesimal numbers; the U.S. branch of the Theosophical Society having only 6,000 members, the number of individuals having been a member for three years decreasing the class size even further, and the age restriction diminishing the eligible pool even more.⁶⁴ Further, the court weighed the small number of potential buyers against the potential demand to own real property in southern California and the desirability of the locale and concluded that demand by restricted purchasers simply outstripped the tiny pool permitted by the covenants to purchase property.⁶⁵

ii. Yankees

Similar to the quasi-religious restraint in *Taormina*, a covenant precluding ownership by individuals of the Yankee "race" and those who had lived north of the Mason-Dixon line for at least one year is also an impermissible and unreasonable restraint against alienation because the remaining class size of potential purchasers is too small.⁶⁶ Given that much of the population in the United States resides in the North and the extreme mobility of the American populace, the covenant arguably limits the class size of prospective buyers substantially. On the other hand, the pool of potential purchasers may not be as impacted if many northerners

60. See *Taormina*, 140 Cal. App. 3d at 973 ("The greater the restraint, the stronger the justification must be to support it. Factors to be considered include the number of people excluded and the effect of the exclusion on that particular group[, the "class size" of potential purchasers].").

61. *Id.* at 973 (describing the location of the community as "Southern California").

62. Theosophy is a philosophy that emphasizes "the study of comparative religions and the latent powers of men." *Id.* at 974.

63. *Id.* at 968-69.

64. *Id.* at 973 n.7.

65. See *id.* at 973 ("In contrast to a vast potential market, the number of Theosophists in the United States is exceptionally small.").

66. See Alfred L. Brophy & Shubha Ghosh, *Whistling Dixie: The Invalidity and Unconstitutionality of Covenants Against Yankees*, 10 VILL. ENVTL. L.J. 57, 58 (1999) (noting that "Henry Ingram attracted substantial attention recently by recording restrictive covenants on his [Beaufort County] South Carolina property, Delta Plantation, that purport to prohibit people who have lived north of the Mason-Dixon line for more than one year from ever purchasing the property"). The covenants also proscribe members of the Yankee "race" from purchasing the property. *Id.* at 59. The restricted parcel of land is located "just north of Savannah, Georgia." *Id.*

do not desire to reside in Beaufort County, South Carolina, as opposed to the southern California locale in *Taormina*.⁶⁷ However, a court would likely err on the side of caution and strike down the Yankee covenants, given that they limit the pool of prospective purchasers to a substantial degree.

iii. Race and Ethnicity

Racially and ethnically restrictive covenants have been the prototypical private bases to exclude individuals from certain neighborhoods. These covenants have included not only ownership bans on black Americans, but also on individuals of Mexican, Asian (particularly persons of Chinese and Japanese heritage), and Jewish descent.⁶⁸

If class size of potential purchasers were used as the yardstick for the reasonableness of a restraint, then many of the racially restrictive covenants promulgated by white neighborhoods in response to the Great Migration were likely unreasonable. Given that many black urban areas were overcrowded and white sellers could command premium prices for restricted lots from black buyers because of black demand,⁶⁹ it would appear that a large pool of potential purchasers was being excluded from owning property and that the restraints were unreasonable.

While certain courts agreed with this conclusion,⁷⁰ others, such as courts in Louisiana and Missouri, held that these covenants were only partial restraints and left a "large enough pool of buyers."⁷¹ This holding seems to defy reason and simply upholds racial prejudice, given the large number of blacks that have resided always in Louisiana.⁷² In addition,

67. See *supra* notes 65-66.

68. See *supra* note 10.

69. See *supra* note 39 and accompanying text.

70. See *White v. White*, 150 S.E. 531, 539 (W. Va. 1929) (holding "a restriction on alienation to an entire race of people, when appended to a fee-simple estate, is void as wholly incompatible with complete ownership"); *Porter v. Barrett*, 206 N.W. 532, 539 (Mich. 1925) (holding a clause requiring that land "shall never be sold or rented to a colored person" is void as a restraint upon the right to sell property); *Los Angeles Inv. Co. v. Gary*, 186 P. 596, 597 (Cal. 1919) (holding a provision in a deed declaring that property "shall not be sold, leased, or rented to any persons other than of the Caucasian race" void as a restraint of alienation).

71. *Rose*, *supra* note 11, at 199; see also *Koehler v. Rowland*, 205 S.W. 217, 220 (Mo. 1918) (stating that "it is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes"); *Queensborough Land Co. v. Cazeaux*, 67 So. 641, 643 (La. 1915) (stating that "while the public policy of the state opposes the putting of property out of commerce, it at the same time favors the fullest liberty of contract, and the widest latitude possible in the right to dispose of one's property as one lists" (citations omitted)); *Kemp v. Rubin*, 69 N.Y.S.2d 680, 685 (N.Y. Sup. Ct. 1947) (finding that a restrictive covenant prohibiting the conveyance of property "to negroes" was not an unlawful restraint upon alienation because "the defendant owner has been free at all times to sell her property to all persons except to those of a particular race, for a limited period of time").

72. See U.S. CENSUS BUREAU, *POPULATION 1920: COMPOSITION AND CHARACTERISTICS OF THE POPULATION BY STATES* (1922), available at <http://www2.census.gov/prod2/decennial/documents/41084484v3ch04.pdf> (reporting that 43.1% of the Louisiana population in 1910 and 38.9% in 1920 was composed of "negroes").

blacks resided at the time in large numbers in Kansas City and St. Louis, the major cities in Missouri.⁷³

Similar litigation concerning covenants barring ownership by non-black racial and ethnic groups arose in areas where these populations historically predominated. For instance, restrictions banning Mexican-Americans were at issue in Texas,⁷⁴ and those involving individuals of Chinese and Japanese descent were litigated in California.⁷⁵

Just as Tip O'Neill, the late Speaker of the House, famously noted that "all politics is local,"⁷⁶ perhaps the same maxim applies to restrictive covenants and the reasonableness rule on alienation. As evidenced by many of the racially restrictive covenant cases,⁷⁷ the *Taormina* case,⁷⁸ and the Yankee covenant,⁷⁹ local conditions of demand by restricted and unrestricted classes, as well as the sheer population numbers of these groups, implicitly affect the calculus of whether certain "who" covenants are reasonable restraints on alienation.

C. THE REASONABLENESS TEST

1. Background

In contrast to their public counterparts in zoning, which are constrained by the Due Process and Equal Protection Clauses of the U.S. Constitution's Fourteenth Amendment,⁸⁰ restrictive covenants are sub-

73. U.S. Census data indicate that the number of blacks in St. Louis and Kansas City was significantly greater than in the rest of the state. *See id.* at 546, 562 (reporting that 9% of the population of St. Louis and 9.5% of the population of Kansas City was composed of "negroes" in 1920, as compared to 5.2% in the state as a whole).

74. *See, e.g.,* Clifton v. Puente, 218 S.W.2d 272, 272-73 (Tex. Civ. App.—San Antonio 1949, writ ref'd n.r.e.); Austin v. Richardson, 278 S.W. 513, 514 (Tex. Civ. App.—San Antonio 1925), *rev'd*, 288 S.W. 180 (Tex. Comm'n App. 1926) (upholding a covenant that "said lot shall never be sold or in any manner transferred or conveyed to Mexicans or negroes"); *see also* MANUEL G. GONZALES, MEXICANOS: A HISTORY OF MEXICANS IN THE UNITED STATES 113 (1999) (describing 1900-1930 as "The Great Migration" and stating that "[a]lthough statistics pertaining to immigration from the south are highly unreliable, it appears that over one million Mexicans entered the country at this time, joining the half million already in residence." Professor Gonzales also notes that "most [Mexican immigrants] settled down in the South-west." *Id.*

75. *See, e.g.,* Shelley v. Kramer, 334 U.S. at 1, 21 (1948); Goetz v. Smith, 62 A.2d 602 (Md. 1948) (restrictive covenant prohibiting the sale lease, transfer, or occupation of the property by "any negro, Chinaman, Japanese, or person of negro, Chinese or Japanese descent"); Gandolfo v. Hartman, 49 F. 181, 181 (S.D. Cal. 1892); *see also* U.S. CENSUS BUREAU, *supra* note 72, at 106 (reporting that 3.8% of the California population was of Asian descent in 1900).

76. TIP O'NEILL & GARY HYMEL, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME, at xii (1994).

77. *See supra* notes 10, 70-75.

78. *See supra* notes 61-65.

79. *See supra* notes 66-67.

80. Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1526 (1982) (describing these constitutional restraints as "undemanding" because the relevant "constitutional issue is whether the contested regulation is rationally related to a legitimate state interest"); *see also* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 13 (1989) ("Constitutional rationality review imposes minimal constraints on public government, requiring only

ject to judicial review under the general "rule of reasonableness."⁸¹ There are two categories of restrictive covenants under this rule.⁸² The first involves original covenants, or those found in a community's original declaration of conditions, covenants, and restrictions.⁸³ The second refers to covenants that are added after conveyance or possession.⁸⁴

The first category, concerning original restrictions, is cloaked with "a strong presumption of validity," given that each owner presumably has received notice of the covenants before purchase.⁸⁵ Commentators have construed this constructive notice as proving that owners have voluntarily consented to the restrictions.⁸⁶ Consequently, these restrictions, even if facially unreasonable,⁸⁷ will be sustained unless they are arbitrarily applied, violate public policy, or run afoul of a "fundamental constitutional right."⁸⁸

In contrast, restrictions that have been promulgated subsequently by a residential community association's board of directors and that were not

a credible instrumental fit between the regulation and a legitimate internal goal of the public agency.").

81. *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981); *see also* *Unit Owners Ass'n of Buildamerica-1 v. Gillman*, 292 S.E.2d 378, 386 (Va. 1982) (affirming the reasonableness test); *Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632, 635-36 (Tex. Civ. App.—San Antonio 1977, no writ) (applying the reasonableness standard to covenants restricting overnight parking); *Ellickson*, *supra* note 80, at 1526 (describing the reasonableness test as more vigorous than its constitutional counterpart for public rules and stating that "[p]revailing common-law and statutory rules ask courts to scrutinize the 'reasonableness' of private regulations—an apparent [invitation] to Lochnerian activism").

82. *Hidden Harbour*, 393 So. 2d at 639.

83. *Id.* at 639-40; *see also* *Unit Owners Ass'n*, 292 S.E.2d at 386.

84. *Unit Owners Ass'n*, 292 S.E.2d at 386; *Hidden Harbour*, 393 So. 2d at 639-40.

85. *Preston Tower Condo. Ass'n v. S.B. Realty, Inc.*, 685 S.W.2d 98, 102 (Tex. App.—Dallas 1985, no writ) (stating that these restrictions are strongly presumed valid because "each owner purchases the [condominium] unit knowing and accepting the restrictions imposed" because Florida mandates "full disclosure" of them); *see also* *Hidden Harbour*, 393 So. 2d at 639.

86. *Lee Anne Fennell, Contracting Communities*, 2004 U. ILL. L. REV. 829, 839; *see also* *Ellickson*, *supra* note 80, at 1526-27 ("The initial members of a homeowners association, by their voluntary acts of joining, unanimously consent to the provisions in the association's original governing documents" resulting in a "true [Lockean] social contract."). In contrast, Professor Ellickson distinguishes cities that enact public restrictions as having a "more coercive (less consensual) form of residential organization." *Id.*

87. *Hidden Harbour*, 393 So. 2d at 640 ("Indeed, a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions found in the declaration of condominium, since such restrictions would be in a potential condition of continuous flux."); *Fennell*, *supra* note 86, at 839 ("Indeed, at least one court has taken the position that restrictions in the declaration evincing a degree of unreasonableness would be upheld.").

88. *Hidden Harbour*, 393 So. 2d at 639-40; *see also* *Unit Owners Ass'n*, 292 S.E.2d at 768 ("A condominium restriction or limitation, reasonably related to a legitimate purpose, does not inherently violate a fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied."); *Preston Tower*, 685 S.W.2d at 102 (noting that this category of covenant "will not be invalidated without a showing that the restriction is arbitrary in its application, against public policy, or abrogates some fundamental constitutional right."); *Fennell*, *supra* note 86, at 838-39 (reiterating that the first class of covenants are "presumptively valid unless violative of public policy or otherwise shown to be arbitrary and without any basis").

in the original declaration of conditions, covenants, and restrictions are subject to a more stringent reasonableness standard.⁸⁹ They must be “reasonably related to the promotion of the health, happiness and peace of mind” of owners.⁹⁰ This more exacting rule is a by-product of the owners’ less than perfect consent to the restrictions.⁹¹ These covenants may be promulgated absent an owner’s consent or, worse, over his objections.⁹²

Flexibility, however, is a hallmark of both versions of the rule of reasonableness, which lends it to wide-ranging descriptions by commentators, such as a “loosely defined standard”⁹³ that is “devoid of real content,”⁹⁴ and that substantively balances the “internal values” of a residential community with those of the broader society.⁹⁵ Professor Alexander hails the adaptability of the reasonableness standard as “open-ended and conversation-inducing.”⁹⁶

Conversely, Professor Ellickson critiques the flexibility lauded by Professor Alexander as an invitation by some judges to ignore the fundamental social contract made by owners and the “enacting association’s own original purposes.”⁹⁷ Professor Ellickson instead favors an interpretation of the reasonableness rule, also favored by some judges, that looks back to the association’s originating documents to determine its “collective purposes” and to assess whether its “actions have been consonant with those purposes.”⁹⁸ The only proviso in this view is that an association’s

89. See *infra* notes 90-92 and accompanying text.

90. *Hidden Harbour*, 393 So. 2d at 640.

91. See *infra* notes 105-07.

92. Fennell, *supra* note 86, at 839.

93. Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 658 (1981).

94. Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 207 (1992).

95. Alexander, *supra* note 80, at 6 (“Courts have tended substantively to review these rules, applying a standard of reasonableness that requires the rules of the group to conform not only to the association’s own internal values but to external values as well—i.e., values that, in the court’s judgment, are widely shared throughout the rest of the polity.”)

96. *Id.* at 59.

97. Ellickson, *supra* note 80, at 1530 (“This variant of reasonableness review ignores the contractarian under-pinnings of the private association [T]he validity of the rule should be judged according to the enacting association’s own original purposes.”).

98. *Id.* (citing *Laguna Royale Owner’s Ass’n v. Darger*, 119 Cal. App. 3d 670, 672 (1981)). The court in *Laguna* held that “[i]n exercising its power to approve or disapprove transfers or assignments [the] Association must act reasonably, exercising its power in a fair and nondiscriminatory manner and withholding approval only for a reason or reasons rationally related to the protection, preservation and proper operation of the property and purposes of [the] Association as set forth in its governing instruments.” *Laguna Royale*, 119 Cal. App. 3d at 680; see also *Holleman v. Mission Trace Homeowners Ass’n*, 556 S.W.2d 632, 636 (Tex. Civ. App.—San Antonio 1977, no writ) (stating that “the Board of Directors are authorized to make reasonable rules pertaining to the common area in the Subdivision” and holding that a covenant restricting overnight parking is reasonable); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1406 (1994) (“On this theory, the covenants of an association constitute a volitional contract, the terms of which are entitled to all the consideration that courts traditionally afford to contracting parties. Ambiguity in the meaning of covenants, on this view, should be resolved

action may not "violate [unspecified] fundamental external norms."⁹⁹

2. Consent

Consent is arguably one of the most powerful arguments in favor of sustaining most restrictive covenants, including those restricting sex offenders.¹⁰⁰ As the common law already acknowledges, consent is the predominant reason for the presumption of validity accorded original or foundational covenants.¹⁰¹ As Professor Ellickson argues, original covenants are a "true social contract," on par with a private constitution, and exemplified by "unanimous ratification" by virtue of notice provided to potential purchasers.¹⁰² Because these restrictions evince a "more perfect form of consent,"¹⁰³ Professor Ellickson posits that they should be upheld far more than their public counterparts.¹⁰⁴

In contrast, Professors Alexander, Frug, and Winokur have derived several factors that they argue undercut the pro-consent arguments.¹⁰⁵ For instance, Professor Alexander points to the coercive nature of developer-initiated original covenants, given that the obligations to assent to restrictions and to join a residential community association are often "bundled"¹⁰⁶ with the purchase of property.¹⁰⁷ Therefore, at least with

only by reference to the intent of the parties rather than to the reasonableness of their agreement.").

99. Ellickson, *supra* note 80, at 1530.

100. See, e.g., *infra* notes 102-04.

101. See *supra* notes 85-88 and accompanying text.

102. Ellickson, *supra* note 80, at 1527; see also Robert G. Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 54 (1990) (reducing consent to a mathematical equation, "Acceptance of deed + Notice = Consent."); Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 295 (1997) ("Unlike citizens, whose options to exit the polity are limited, potential homebuyers are free not to purchase a home in an association-governed building or subdivision if the association's rules are unattractive.").

103. Note, *Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 478 (1995) ("Proponents of unfettered experimentation in the creation of residential associations argue that members do not need the 'constitutional' protections against an association that all citizens retain against traditional forms of government, for those who have joined a residential association or participated in making its laws have exercised greater freedom, or shown a more perfect form of consent, than have citizens of traditional polities.").

104. Ellickson, *supra* note 80, at 1528.

105. See *infra* notes 106-09, 111-13, and accompanying text.

106. Natelson, *supra* note 102, at 55 (explaining that Professor Alexander's view is that "each servitude is 'bundled' with real estate and, in the modern covenanted subdivision, with many other servitudes"); see also Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM. L. REV. 546, 577 (1991) (commenting that Professor Alexander starts from the premise that "[p]eople are 'coerced' by the bundlings of distinctive units of choice: purchasers of burdened property are forced to accept the burdens that they do not want in order to get the property that they do want.").

107. Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 902 (1988). Professor Alexander comments that:

This view of homeowners' association [adopted by Professor Ellickson] overlooks the coercive nature of members in these institutions. Developers typically use servitudes to compel purchasers to join homeowners' associations. The purchase of land in planned resident communities is burdened with the obligation of membership; purchasers simply do not have the choice of opt-

subsequently added covenants, consent is undercut because, arguably, some owners may not have wanted to be members of an association or to be bound by its subsequent actions. Also implicit in Professor Alexander's conclusion is a greater respect for group autonomy over that of the individual, as well as the supremacy of the collective over the singular.¹⁰⁸

While in Professor Ellickson's world, it is easier to leave a community if one does not agree with subsequently added covenants because individuals have choices about the kinds of communities in which they may reside, Professor Alexander states that leaving is "at best an imperfect strategy" because of the "immobility" and illiquidity of a home.¹⁰⁹ In contrast, other commentators have responded that Professor Alexander's view is simply too narrow—consumers across markets often are forced to accept bundled choices and the fact that the "market is not perfectly calibrated to countless individual preferences" does not mean that constrained and coercive choices necessarily result.¹¹⁰

Yet, the constraint of housing choices is especially extreme in many housing markets, given that much of the nation's affordable housing is dominated by servitudes imposed by developers and mandated memberships in residential community associations.¹¹¹ For instance, Professor Winokur points out that servitude regimes have not only become the norm, but also have become homogenized and uniform, reinforcing their proliferation.¹¹² As increasing numbers of common interest developments contain sex offender covenants, it stands to reason that these covenants will become more standardized, ensuring their proliferation and

ing out of the association's decisions while remaining residents of the development.

Id.; see also Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1590 (1982) ("[T]he original constitution of a homeowners association might well be the work of a developer without the participation of a single person who becomes a resident of the community.").

108. See Alexander, *supra* note 80, at 1-6 (theorizing that residential community associations provide an ideal vehicle for examining notions of autonomy between the individual, the group, and the broader polity).

109. Alexander, *supra* note 107, at 888.

110. Robinson, *supra* note 106, at 577.

111. Brower, *supra* note 94, at 248 (questioning the assumption "that there is sufficient variety of affordable housing in the desired location to permit a voluntary consumer choice among common interest developments and their regulations, or between a common interest development and traditionally unrestricted housing" based on the "statistical evidence of the explosion in the number of common interest developments, especially in the Sunbelt"); Fennell, *supra* note 86, at 877-78 ("The explosive growth of private developments in recent years means that many consumers are encountering this new form of ownership for the first time. Often, homes in private developments are the only affordable choices for young couples making their first home purchases."); James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 5 (1989) (noting that housing markets are dominated by "potentially perpetual, uniform servitude regimes").

112. Winokur, *supra* note 111, at 58-59 ("Furthermore, as more and more residential properties are bound by servitude regimes, and standard forms proliferate, the option to reject the model(s) of servitude regimes prevailing in a given area becomes less realistic for substantial segments of the real estate market, particularly for those buyers who wish to enjoy either suburban or condominium living. What might be objectionable in one set of restrictions will increasingly be contained in restrictions of other area subdivisions.").

further impact on affordable housing options for convicted sex offenders.¹¹³ In addition, further subverting Professor Ellickson's absolute interpretation of consent in the context of original restrictive covenants, given their contractarian underpinnings,¹¹⁴ is the legal tenet that freedom of contract is not absolute.¹¹⁵

3. *Examples of Reasonableness: Age and Pet Restrictions*

a. Age Restrictions

While courts largely ignored the reasonableness of racially restrictive covenants,¹¹⁶ the same cannot be said for another type of "who" covenant: the restrictive covenant banning the residency of individuals under the age of fifty. Accordingly, age covenants, along with pet restrictions, are the paradigmatic "who" covenants upheld under the rule of reasonableness.¹¹⁷ Indeed, the Fair Housing Act (FHA), federal legislation designed to prohibit discrimination in housing based on largely immutable and personal criteria such as race, ethnic origin, handicap or disability,¹¹⁸ carves out an explicit exception for senior-only accommodations.¹¹⁹

Otherwise stated, the FHA explicitly preferences private age restrictions, while disfavoring other private "who" restrictions, such as those based on race, ethnicity, and disability, that have proved historically popular.¹²⁰ One reason offered for this exception is a legislative recognition that seniors have special housing needs and must be protected from "the distractions and disturbances often caused by a large number of children [or younger adults] living in the development."¹²¹

Perhaps taking the FHA's cue, many courts have upheld age covenants as reasonable, under the Equal Protection Clause and at least one state

113. See *supra* notes 111-12 and accompanying text.

114. See Terrell R. Lee, *In Search of the Middle-Ground: Protecting the Existing Rights of Prior Purchasers in Common Interest Communities*, 111 PENN ST. L. REV. 759, 771-72 (2007) (discussing the "dual nature of the common interest community" and stating that "[c]ommon interest communities must be viewed as neither pure conveyances of property nor pure contractual agreements to submit to HOA governance, but a hybrid of both characterizations").

115. Sterk, *supra* note 102, at 274 ("First, our legal regime does not sanction absolute freedom of contract . . . [W]hen particular contracts, or particular categories of contract, do not advance the goals that underlie contract enforcement, doctrines often emerge to counteract the norm. The unconscionability doctrine in contract law and nonwaivable warranty of habitability in landlord-tenant law are prominent examples.")

116. See *infra* notes 128-31.

117. See *infra* notes 118-22 and accompanying text regarding age covenants. For pet owner covenants, see *infra* notes 125-26 and accompanying text.

118. Fair Housing Act, 42 U.S.C. § 3604(a) (2006) (stating that, "it shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."); § 3604(f)(1) (prohibiting discrimination "because of a handicap").

119. *Id.* § 3607 (allowing housing for "older persons" under certain exceptions).

120. See *supra* notes 118-19.

121. *Riley v. Stoves*, 526 P.2d 747, 753 (Ariz. Ct. App. 1974).

anti-discrimination statute.¹²² Those courts that have held the other way have incurred the wrath of dissenting judges that subscribe to Professor Ellickson's view—that restrictions should be judged by the original intentions and purpose of the community.¹²³ In sustaining many age restrictions as reasonable, courts also may be adhering tacitly to the pro-consent arguments of the Ellickson camp,¹²⁴ especially given the particular needs of seniors.

b. Pet Restrictions

Restrictive covenants that prohibit pets also prohibit actual or potential pet owners from residency in a CIC. While these covenants are not the typical "who" restrictions that preclude residency or ownership based on personal and largely immutable characteristics, the effect is largely to exclude certain individuals based on personal preferences. The standard-bearer for these restrictions is *Nahrstedt v. Lakeside Village Condominium Ass'n*,¹²⁵ in which the California Supreme Court upheld a condominium association's original covenant prohibiting dogs, cats, and birds under the rule of reasonableness.¹²⁶

Does consent by would-be or current pet owners explain why courts are likely to uphold pet restrictions, especially those that have been originally declared?¹²⁷ Or is it that, on the scale of personal characteristics and preferences, a preference for pets ranks lower than providing peace

122. See, e.g., *Hill v. Fontaine Condo. Ass'n*, 334 S.E.2d 690, 690 (Ga. 1985) (sustaining an amendment to original covenants "restricting permanent residence to persons 16 years old or older" and citing favorably to other opinions upholding age restrictions); Ellickson, *supra* note 80, at 1528 ("By contrast, homeowners-association regulations that limit the age of dwelling occupants have tended to survive legal challenge."). The validity of age covenants appears to be settled case law, given that the FHA specifically makes allowances for senior-only accommodations. See *supra* note 119. But see *Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App. 3d 87, 95 (Cal. Ct. App. 1986) (striking down covenants precluding anyone under the age of forty-five years from residing in a subdivision as "patently violative" of California's Unruh Act, which prohibits arbitrary discrimination, and "therefore unenforceable").

123. See *supra* notes 97-99, 102-04, and accompanying text (Ellickson's viewpoint); see also *O'Connor v. Village Green Ass'n*, 662 P.2d 427, 436 (Cal. 1983) (Mosk, J., dissenting) (commenting on the "disastrous" holding by the majority "for the many well-conceived, constructively operated developments in this state limited to persons over a prescribed age" who have "earned their right to retirement in other parts of the country" and whose "comfort and peace of mind should not be deemed expendable on the altar of judicial creativity").

124. See *supra* notes 102-04 and accompanying text.

125. 878 P.2d 1275 (Cal. 1994).

126. See *id.* at 1292 (sustaining an original covenant banning pets); see also *Villa de Las Palmas Homeowners Ass'n v. Terifaj*, 90 P.3d 1223, 1234 (Cal. 2004) (holding, "as [they] did in *Nahrstedt*, that the recorded restriction prohibiting pets is not unreasonable as a matter of law," and upholding a subsequently added pet restriction). But see CAL. CIV. CODE § 1360.5 (West 2007) ("No governing documents shall prohibit the owner of a separate interest within a common interest development from keeping at least one pet within the common interest development, subject to reasonable rules and regulations of the association.").

127. See, e.g., *Nahrstedt*, 878 P.2d at 1292 (stating that the pet covenants were originally declared).

and tranquility to seniors and far lower than racially integrating neighborhoods?

4. *The Counter-Example: The Racially Restrictive Covenant*

In theory, yesteryear's racially restrictive covenant, the archetypal "who" covenant, provided an interesting context in which to apply the general reasonableness test. Yet, few courts ever actually applied this test to these covenants,¹²⁸ preferring instead to apply the rule against restraints on alienation,¹²⁹ public policy,¹³⁰ or even federal due process.¹³¹ A strict application of Professor Ellickson's interpretation of the rule of reasonableness would suggest that these covenants were reasonable,¹³² given that they were often original covenants, restricted persons had notice of them,¹³³ and these individuals arguably had consented to them. This conclusion is especially true because, prior to *Shelley v. Kraemer*, in which the Supreme Court struck down racially restrictive covenants,¹³⁴ these covenants arguably did not violate any fundamental norm and were not an affront to domestic public policy though, internationally, this norm was found wanting.¹³⁵ Indeed, much of public policy at the time may

128. See, e.g., *Goetz v. Smith*, 62 A.2d 602, 603-04 (Md. 1948) (avoiding the rule of reasonableness, but holding that the racially restrictive covenants prohibiting "any negro, Chinaman, Japanese, or person of negro, Chinese, or Japanese descent" was prohibited under the Constitution's Equal Protection Clause); *Sipes v. McGhee*, 25 N.W.2d 638, 642-43, 645 (Mich. 1947), *rev'd*, *Shelley v. Kraemer*, 334 U.S. 1 (1998) (ignoring the reasonableness rule and discussing public policy and restraints on alienation, but ultimately declining to overturn racially restrictive covenants prohibiting all but "those of the Caucasian race"); *Kraemer v. Shelley*, 198 S.W.2d 679, 681, 683 (Mo. 1946), *rev'd*, 334 U.S. 1 (1948) (failing to apply the rule of reasonableness and agreeing that overcrowded housing conditions for black Americans was an affront to public policy, but holding that it could not strike down deed restrictions forbidding residents of the "Negro or Mongolian Race").

129. See *supra* notes 69-71 and accompanying text.

130. See *Sipes*, 25 N.W.2d at 642-43; *Kraemer*, 198 S.W.2d at 683.

131. See *Goetz*, 62 A.2d at 603-04.

132. See *supra* notes 97-99. In fairness, Professor Ellickson states that original covenants regulating the "racial characteristics of [residential community] association members" are "offensive" and are exceptions to the laissez-faire interpretation of the rule that he supports for these covenants. Ellickson, *supra* note 80, at 1527-28.

133. Ware, *supra* note 12, at 742 ("Despite the limitations imposed by the covenants, black home buyers invariably found ways to circumvent them. The most prevalent device was the use of a white 'strawman' to purchase property. Under this system, a white buyer would purchase a home, then immediately resell the property to a black purchaser.") Indeed, the Shelleys used a white strawman to purchase their home in the racially restricted neighborhood at issue in *Shelley v. Kraemer*. Ware, *supra* note 12, at 751-52 (noting that the Shelleys' realtor "negotiated a sale to a straw purchaser who later" resold it to the couple).

134. *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948).

135. See *supra* note 88 (referring to exceptions for the presumptive validity of original restrictive covenants under the rule of reasonableness); see also *supra* notes 11, 13 (regarding the public policy and norms of the era with respect to racially integrated neighborhoods). Mary Dudziak notes:

[i]n the years following World War II, racial discrimination in the United States received increasing attention from other countries. Newspapers throughout the world carried stories about discrimination against non-white visiting foreign dignitaries, as well as against American blacks. At a time when the U.S. hoped to reshape the postwar world in its own image, the

have weighed against residential integration.¹³⁶

In contrast, modern fundamental norms and public policy have progressed to disavow these beliefs. In today's context, therefore, besides being unconstitutional under the state action doctrine of *Shelley v. Kraemer*,¹³⁷ racially restrictive covenants would also be unreasonable because they unequivocally violate public policy.¹³⁸

D. PUBLIC POLICY

While a strict application of the consent theory might support upholding all restrictive covenants under the rule of reasonableness unless they violate some fundamental norm,¹³⁹ expansive views of public policy have proved to be fertile ground for striking down many of the "who" covenants based on race and disability.¹⁴⁰ On the other hand, courts have used public policy to sustain restrictive covenants based on another personal characteristic: age.¹⁴¹

1. Single Family Restrictions and Disabled Individuals

Ground zero for the use of public policy to invalidate privately legislated restrictive covenants has been cases involving private prohibitions of group homes for disabled individuals, most commonly the mentally challenged¹⁴² and those suffering from AIDS,¹⁴³ under a CIC covenant

international attention given to racial segregation was troublesome and embarrassing. The focus of American foreign policy at this point was to promote democracy and to 'contain' communism. However, the international focus on U.S. racial problems meant that the image of American democracy was tarnished. The apparent contradictions between American political ideology and practice led to particular foreign policy difficulties with countries in Asia, Africa and Latin America. U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.

Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62-63 (1988).

136. See *supra* notes 11, 13, and accompanying text.

137. 334 U.S. at 14, 20-21.

138. See *infra* notes 153-55 and accompanying text. But see *Hurd v. Hodge*, 334 U.S. 24, 34 (1948) (companion case to *Shelley v. Kraemer*) ("But even in the absence of the statute, there are other considerations which would indicate that enforcement of [racially] restrictive covenants in these cases is judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in the exercise of its supervisory powers over the courts of the District of Columbia." (emphasis added)).

139. See *supra* note 135 and accompanying text.

140. See *infra* notes 142-55 and accompanying text.

141. See *infra* notes 156-58 and accompanying text.

142. Robert D. Brussack, *Group Homes, Families, and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33, 48 (1981) (noting that "[t]he group home has proved an attractive living arrangement not only for the mentally retarded but also for the mentally ill, delinquent or emotionally troubled children, and the dependent elderly," and that these "homes have encountered considerable neighborhood resistance" in the "form of litigation based . . . , more recently, [on] a private subdivision covenant").

143. See, e.g., *Hill v. Cmty. of Damien of Molokai*, 911 P.2d 861, 865 (N.M. 1996) (stating that the "underlying facts of this case" involved the leasing of a group home for four people living with AIDS in a common interest community that restricted use of lots to "single family residence purposes" only); see also *Baldwin v. Nature's Hideaway, Phase I-B Homeowners Ass'n*, 613 So. 2d 1376, 1378 (Fla. Dist. Ct. App. 1993) (Altenbernd, J., con-

restricting occupation to only "single family use."¹⁴⁴ Similar to the history and use of racially restrictive covenants pre-*Shelley* and post-*Buchanan*,¹⁴⁵ these covenants became much more hotly contested after public zoning of group homes for these individuals was struck down under the tide of changing norms of public policy promoting the deinstitutionalization and integration of the mentally challenged.¹⁴⁶ In addition, *Cleburne* and the Equal Protection Clause forbade the unequal treatment of this population based simply on "private preferences" or "fear of and revulsion toward the mentally retarded" by public entities.¹⁴⁷ In fact, the FHA explicitly prohibits housing discrimination towards handicapped individuals.¹⁴⁸

As in the case of racially restrictive and sex offender covenants,¹⁴⁹ CICs have also been motivated to enact and enforce "single family use" covenants that impact residential arrangements for disabled individuals because they are concerned about dramatic changes to their communities' "underlying character," including "increased noise and traffic, decreased safety, and a devaluation of property."¹⁵⁰ However, numerous

curing specially) (noting, with reference to the application of a covenant prohibiting nuisances to a group home for six elderly adults in an adult foster care program, that "[i]ndividual neighborhoods should not be allowed to decide that a small home, occupied by elderly or disabled residents, is a locally undesirable land use, and override state law by writing a deed restriction that would be unenforceable as a zoning ordinance").

144. See Gillette, *supra* note 98, at 1433 ("Consider, for instance, the issue of whether prohibitions in covenants on the operation of businesses within the association or limitations of occupancy to 'single-family' residences can be enforced to prohibit group homes."); see also Thomas F. Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421, 426 (1984) ("A court also will seek to determine the meaning of such words as 'family' and 'single-family.'" (collecting cases involving private restrictions prohibiting group homes of individuals with disabilities)).

145. See *supra* notes 11-13 and accompanying text; see also Guernsey, *supra* note 144, at 426.

146. Brussack, *supra* note 142, at 46-47 ("The group homes litigation should be seen primarily in the larger context of the movement to deinstitutionalize the mentally retarded."); see also Guernsey, *supra* note 144, at 421 ("Recent years have evidenced a growing deinstitutionalization of a wide variety of people, including the mentally retarded.").

147. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1139, 1130 (1986); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause.").

148. The FHA defines handicap as "a physical or mental impairment which substantially limits one or more of such person's major life activities." See 42 U.S.C. §§ 3602, 3604 (2006).

149. See *supra* notes 10, 13, and accompanying text (regarding racially restrictive covenants); see also *supra* notes 3-5 and accompanying text (regarding sex offender restrictions).

150. Guernsey, *supra* note 144, at 424, 426. Professor Guernsey, however, points out that empirical evidence suggests that "group homes for the mentally retarded do not affect property values." *Id.* at 454 & n.197 (citing J. WOLPERT, *GROUP HOMES FOR THE MENTALLY RETARDED* (1978); DEVELOPMENTAL DISABILITIES LEGISLATIVE PROJECT OF THE ABA COMM'N ON THE MENTALLY DISABLED, *ZONING FOR COMMUNITY HOMES SERVING DEVELOPMENTALLY DISABLED PERSONS* 2 n.10 (1978); Michael Dear, *Impact of Mental Health Facilities on Property Values*, 13 CMTY. MENTAL HEALTH J. 150 (1977)).

courts have held that these concerns are of little consequence when weighed against state public policies favoring the deinstitutionalization and integration of disabled populations, particularly the mentally challenged.¹⁵¹

2. *Racial Restrictions*

In addition to invalidating restrictions precluding the residency of the mentally challenged and of individuals afflicted with AIDS, public policy arguments provided fertile ground for challenging racially restrictive covenants.¹⁵² In the context of these covenants, the challengers framed the public policy argument as one involving access to decent and sanitary housing by people of color.¹⁵³ For instance, Justice Traynor of the California Supreme Court stated in a concurrence to *Fairchild v. Raines* that “the steady migration of southern negroes and the influx of negroes into urban communities in response to the increasing demands of industry for labor, together with race segregation . . . have made it impossible for many negroes to find decent housing in large centers of population.”¹⁵⁴ The concurrence went on to say definitively that segregation, partially in the form of racially restrictive covenants, “has kept the Negro-occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals and general decency of cities, and ‘plague spots for race exploitation, friction and riots.’”¹⁵⁵

151. See, e.g., *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484, 486 (S.C. 1991) (concluding that the interpretation of a subdivision’s covenant restricting the use of property for only private residential purposes to preclude a group home for nine mentally challenged adults “is contrary to public policy as enunciated by both state and federal legislation”) (citing Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3602-3608 (1990) (prohibiting housing discrimination towards disabled persons); S.C. CODE ANN. § 43-33-510 (1976); S.C. CODE ANN. § 6-7-830 (1989) (exempting group homes for mentally disabled individuals from zoning ordinances); South Carolina’s Bill of Rights for Handicapped Persons); *Deep E. Tex. Reg’l Mental Health & Mental Retardation Servs. v. Kinnear*, 877 S.W.2d 550, 559-60 (Tex. App.—Beaumont 1994) (reversing an injunction prohibiting the construction of a group home for six mentally challenged women in a subdivision with a covenant limiting dwellings to single family residences because of a Texas policy to support the deinstitutionalization of these individuals), *rev’d*, *Kinnear v. Tex. Comm’n of Human Rights*, 14 S.W.3d 299 (Tex. 2000). But see *Mains Farm Homeowners Ass’n v. Worthington*, 854 P.2d 1072, 1077 (Wash. 1993) (en banc) (holding that the record was insufficiently developed with respect to public policy in Washington favoring adult group homes as an alternative to institutionalization of these individuals); *Clem v. Christole, Inc.*, 582 N.E.2d 758, 785 (Ind. 1991) (upholding the application of a subdivision’s restrictive covenant limiting construction only to single-family dwellings to ban a group home for developmentally challenged adults under Indiana’s contract clause).

152. See *infra* notes 153-55 and accompanying text.

153. See, e.g., *infra* notes 154-55 and accompanying text.

154. 151 P.2d 260, 268 (Cal. 1944) (Traynor, J., concurring).

155. *Id.* at 269 (quoting CHARLES S. JOHNSON, REPORT OF THE COMMITTEE ON NEGRO HOUSING OF THE PRESIDENT’S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP 45-46 (1932)); see also *Mays v. Burgess*, 147 F.2d 869, 877 (D.C. Cir. 1945) (Edgerton, J., dissenting) (decrying the limited supply of housing for black Americans as a result of racially restrictive covenants in the District of Columbia and the higher housing prices charged this population as a result). But see *id.* at 873 (Miller, J., concurring) (accepting the dissent’s statements but ultimately upholding an injunction to prevent black homeowner defendants from occupying a home bound by racially restrictive covenants). Public

3. Age Restrictions

In contrast to racially restrictive covenants, public policy, like the rule of reasonableness,¹⁵⁶ has been used *to sustain* age restrictions. For example, courts have noted that public policy, as well as the Fair Housing Act,¹⁵⁷ support the argument that seniors are entitled to a measure of peace and quiet in their living arrangements.¹⁵⁸

E. PUBLIC POLICY AS FOUNDATIONAL IN "WHO" COVENANTS

The study of "who" covenants under the common law concludes that the underlying factor used by judges to determine their validity is whether they conform to public policy.¹⁵⁹ Since restrictive covenants probably impact consumer choice in the housing markets, public policy in the "who" covenant area centers around whether the effect of these covenants is to unduly impact access to safe and decent housing by certain populations. One thing is clear: unsubstantiated fear-based "private preferences"¹⁶⁰ that often form the underlying motive in the "who" covenants cannot trump the open housing demands of public policy.¹⁶¹ Moreover, implicit in this judicial conclusion is the notion that the social costs of open housing must be shared.¹⁶²

1. Touch and Concern

The examination of racial and sex offender covenants under the benefit side of touch and concern illustrates that a population group's *perception* of increased safety or property values, however biased or misinformed, can marginally impact beneficiaries' property values or enjoyment.¹⁶³ However, does this conclusion suggest that perception alone can *never* justify restrictive covenants?¹⁶⁴

The architectural covenant is instructive as a counter-example. Like its more personal counterparts, it may reflect certain subjective biases based on what is "ugly" or "attractive," qualities that arguably can impact beneficiaries' enjoyment and property values. Yet, these biases are aesthetic

policy arguments used to support racially restrictive zoning were (1) promotion of "public peace"; (2) maintenance of "racial purity"; and (3) mitigation of the destruction of property owned by whites by people of color. *Buchanan v. Warley*, 245 U.S. 60, 73-74 (1917).

156. See *supra* notes 117-24 and accompanying text.

157. See *supra* notes 118-21 and accompanying text.

158. See *supra* notes 118-24 and accompanying text.

159. See *supra* Part I. These common law rules are touch and concern, the doctrine prohibiting restraints on alienation, and the rule of reasonableness. See *supra* Parts I.A-C. It is self-evident that the common law rule that restrictive covenants should conform to public policy would focus on conformity to public policy. See *supra* Part I.D.

160. See Sunstein, *supra* note 147, at 1130.

161. See *infra* notes 162-76 and accompanying text.

162. See, e.g., *supra* notes 152-55 (public policy arguments regarding racially restrictive covenants), 142-51 (public policy arguments concerning disability covenants).

163. See *supra* notes 38, 42, and accompanying text (racially restrictive covenants); *infra* notes 181-82, 184, and accompanying text (sex offender covenants).

164. The development of Parts I.E.1. and I.E.2. was aided by conversations with Thomas Kleven.

rather than personal. What distinguishes architectural restraints from their "who" analogues is that the latter, usually motivated by unsubstantiated fear, ultimately touch upon public policy and the kind of society we want to have.

On the other hand, are all restrictions based on personal and largely immutable characteristics *per se* void under touch and concern because they do not involve the use and enjoyment of land?¹⁶⁵ In the "who" covenant context, the answer to this question ultimately depends upon whether a restriction violates or conforms to public policy.¹⁶⁶ For instance, age covenants are the obvious exception to a *per se* rule under touch and concern, given that they are largely viewed as reasonable under public policy.¹⁶⁷ In contrast, because they largely run afoul of open housing norms in public policy, their counterparts in race and disability violate touch and concern because they do not regard the use and enjoyment of land.¹⁶⁸

2. *Restraint Against Alienation and Rule of Reasonableness*

The common law property rule prohibiting unreasonable restraints on alienation essentially boils down to the same question posed by the rule of reasonableness: whether a restriction is reasonable.¹⁶⁹ In turn, the reasonableness of a restriction ultimately depends on whether it conforms to public policy.¹⁷⁰

For instance, there are a number of restrictions, such as single-family use limitations or minimum lot requirements that might well be perceived to be restraints on alienation from the *buyer's* perspective.¹⁷¹ Weakening a claim of unreasonableness, however, is the fact that many buyers ultimately factor these restrictions into the purchase price.¹⁷² Moreover, this reasoning holds up as much with subsequently adopted restrictions as with those that are initially promulgated.¹⁷³ While buyers may be unaware of any future restrictions yet to be adopted, they are ultimately on notice that a majority or supermajority of homeowners may adopt restrictions, of which they may disapprove or consider unreasonable restraints on alienation.¹⁷⁴ Yet, buyers will bargain accordingly at the time of purchase, again mitigating a claim of an unreasonable restraint on

165. See *supra* notes 33-35 and accompanying text.

166. See *supra* note 158 and accompanying text.

167. See *supra* notes 156-58 and accompanying text.

168. See *supra* notes 142-51 and accompanying text.

169. See *supra* notes 59, 81.

170. See *supra* notes 88, 95, 99, and accompanying text.

171. See generally Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359-60 (1982).

172. Professor Epstein suggests that parties will take into account future transaction costs when drafting agreements that contain personal covenants. See *id.* at 1360 ("If a seller insists that a personal covenant bind the land even though it works to the disadvantage of the immediate or even future purchasers, then the seller will have to accept a reduction in the purchase price to make good his sentiments.").

173. See Sterk, *supra* note 102, at 282.

174. See *id.*

alienation.¹⁷⁵

What this line of reasoning suggests, therefore, is that the relevant perspective with respect to reasonableness, at least in the “who” covenant context, is that of potential buyers who are frozen out of the housing market by these covenants. With few exceptions, freezing out potential buyers or residents from the housing market based on personal and largely immutable characteristics, such as race or ethnicity, disability, or quasi-religious affiliation, and unsubstantiated fear violates open housing public policy norms.¹⁷⁶

II. SEX OFFENDER COVENANTS: THE LATEST IN “WHO” COVENANTS

Sex offender covenants are the latest iteration of the “who” covenant, given that they are predicated on an individual’s status as a convicted sex offender,¹⁷⁷ a status that often endures perpetually.¹⁷⁸ The impetus for these covenants is that all convicted sex offenders are destined to reoffend against children, irrespective of an individual’s original crime or future risk of dangerousness.¹⁷⁹ However, two questions remain: (1) How do the common law property doctrines judge these latest “who” covenants? and (2) Are these covenants more like race and disability “who” covenants because they *violate* current public policy norms of open housing, or are they more like many age “who” covenants because they *conform* to these same norms?¹⁸⁰ In the face of the competing policy concerns of open housing and public safety, this Article ultimately argues that the common law should be used to terminate sex offender covenants that are not narrowly tailored to restrict the residency of the most dangerous of this population, based on original crime and future risk of dangerousness.¹⁸¹

175. See Epstein, *supra* note 171, at 1360.

176. See, e.g., *supra* notes 152-55 and accompanying text.

177. See *supra* note 3.

178. See *supra* note 58 and accompanying text.

179. See *supra* notes 21, 23, and accompanying text.

180. See *infra* notes 245-50 and accompanying text.

181. See, e.g., *supra* note 3 (restrictive covenants in the Panther Valley subdivision). Given that a number of public residency restriction regimes on convicted sex offenders have been sustained, see Tekle-Johnson, *supra* note 17, at 623 nn.66, 67, it is fair to ask whether private residency regimes on this same population might be held violative of public policy under the common law property doctrines. The court in *Panther Valley* seemed to suggest that the answers are mutually exclusive. See *infra* note 227. While the Supreme Court has not yet ruled on the validity of public sex offender residency regimes—thereby providing a definitive answer, at least in theory, on their validity—a growing consensus is emerging from a number of stakeholders, such as law enforcement, academics, and prosecutors, that, by shutting out convicted sex offenders from habitable housing, public sex offender residency restriction regimes do more harm than good. See, e.g., *supra* notes 20, 21, and accompanying text. Similarly, at least a couple of courts have invalidated local public residency schemes on convicted sex offenders on the basis that they were preempted by state regulation of this population. See, e.g., *New York v. Oberlander*, No. 02-354, 2009 WL 415558, at *4 (N.Y. Sup. Ct. Jan. 22, 2009) (“As the State has expressed its intention to preempt the area, and, the ordinance conflicts with State law, Local Law No. 1 of 2007 is invalid.”); *id.* (“Sex offender residency restrictions are multiplying throughout New York

A. TOUCH AND CONCERN

1. *Benefit*

a. Property Value

Arguably, sex offender covenants may increase the value of a beneficiary's land, thereby permitting the benefit of a restrictive covenant to run with the land.¹⁸² For instance, empirical evidence supports a small link between sex offenders residing within one-tenth of a mile and devaluations in home values.¹⁸³ At a minimum, this evidence suggests that land values outside of a particular radius are protected or even increased because the residence of a sex offender would devalue adjacent property within the radius. On the other hand, given the rather limited effects of a convicted sex offender's residence on property value, the same argument could not be made for land outside of the one-tenth of a mile zone. At that point, there is no increase in value at all as a result of the sex offender covenant. Overall, therefore, the degree to which land value is increased is rather limited, especially when balanced against the grave legal and policy impacts of these restrictions.¹⁸⁴

b. Enjoyment

Sex offender covenants may increase beneficiaries' enjoyment of real property by promoting a community's sense of tranquility and preventing

State, as local legislatures scramble to outmaneuver each other with highly restrictive ordinances designed to banish registered offenders from their communities. 'Not in my backyard' residency restrictions are spreading unchecked through county, town and village ordinance books from Suffolk County to Niagara Falls. More than 80 such laws have recently been enacted in New York . . . Even without vigorous enforcement, the ordinances interfere with parole and probation officers' efforts to find suitable housing for offenders") (citing Alfred O'Connor, *State Preemption of Local Sex-Offender Residency Laws*, N.Y.L.J., Nov. 24, 2008); *G.H. v. Twp. of Galloway*, 951 A.2d 221, 223 (N.J. Super. Ct. App. Div. 2008) ("We hold that the ordinances [applying to the residency of convicted sex offenders] are preempted by state law and therefore invalid.").

182. See *infra* note 183.

183. Leigh L. Linden & Jonah E. Rockoff, *There Goes the Neighborhood? Estimates of the Impact of Crime Risk on Property Values From Megan's Laws* 3-4 (Nat'l Bureau of Econ. Research, Working Paper No. 12253, 2006), available at <http://www.nber.org/papers/w12253> (concluding that, although "homes directly adjacent to an offender decline in value by 12 percent, . . . [they found] no evidence of any impact on homes located more than a tenth of a mile away from offenders' locations"). On the other hand, a prior study which examined "3,200 home transactions in Montgomery County, Ohio," found that, as a result of publicly available information concerning the residences of convicted sex offenders:

On average, houses located within one-tenth of a mile of a sexual offender sold for 17.4 percent less than similar houses located farther away, houses between one-and two-tenths of a mile from an offender sold for 10.2 percent less, and houses between two and three tenths of a mile from an offender sold for 9.3 percent less.

Suzanna Hartzell-Baird, *When Sex Doesn't Sell: Mitigating the Damaging Effect of Megan's Law on Property Values*, 35 REAL EST. L.J. 353, 369 (2006) (citing Wright State University, Communications and Marketing, *Sex Offenders Hurt Property Values*, Wright State University Study Shows (Apr. 12, 2002), http://www.wright.edu/cgi-bin/news_item.cgi?310).

184. See *infra* notes 201-07, 224-31, 236-44, and accompanying text (concerning these restrictions as restraints on alienation, unreasonable, and as violations of public policy, respectively).

the harassment of convicted sex offenders, simply because there are few to none to harass.¹⁸⁵ For instance, as Justice Souter noted in *Smith v. Doe*, the most recent Supreme Court case to examine the first wave of sex offender legislation—registration requirements and community notification mandates—convicted sex offenders are often the target of harassment by certain communities ill at ease with their residence and proximity.¹⁸⁶

Arguably, this first wave is not only the cause of sex offender harassment, but also the enabler of private and public sex offender residency schemes.¹⁸⁷ In contrast to information about other criminal offenders, there are minimal costs associated with accessing personal information on sex offenders.¹⁸⁸ Indeed, but for these initial statutory regimes, it would be difficult and perhaps nearly impossible to determine if one's neighbor is a convicted sex offender. Unlike the phenotypic cues of skin color and facial construction, which largely serve to convey to society one's race and ethnicity,¹⁸⁹ no physical societal cue exists to communicate one's status as a convicted sex offender.

Does the beneficiary's enjoyment from a sex offender covenant stem directly from a *per se* use of land or is it derived more indirectly, a reflection of the charged atmosphere surrounding the convicted sex offender spurred by the first wave of sex offender legislation? Arguably, a sex offender covenant "has no obvious connection with the land *uses* normally associated with 'touch and concern.'"¹⁹⁰ For example, a neighbor's promise to trim the hedges not only concerns a concrete use of land, but also directly benefits a covenantee because the latter will have a better view.

185. See *Smith v. Doe*, 538 U.S. 84, 109 (2003) (Souter, J., concurring).

186. *Id.* (quoting *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997), which noted "numerous instances in which sex offenders have suffered harm in the aftermath of notification—ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson").

187. See *infra* note 188.

188. Strahilevitz, *supra* note 16, at 1889-91 (stating that every state's Megan's Law permits the publication of internet sex offender registries and that access is largely unrestricted and free, and underscoring that there is no equivalent public registry for offenders of other serious crimes, such as murder or "crimes more likely to target proximate strangers (such as burglary and automobile theft)," but if there were, one would expect "significant numbers of homeowners associations prohibiting the sale of units to murderers, burglars, and car thieves as well").

189. There are, of course, exceptions to this admittedly inaccurate phenotypic rule. This argument was used by the NAACP to challenge racially restrictive covenants. NAACP attorneys challenged some whites' automatic assumption, based strictly on what they saw, that particular purchasers were black. Ware, *supra* note 12, at 747 (stating that one legal strategy used by Charles Hamilton Houston, then NAACP's legal counsel and Dean of Howard Law School, to defeat racially restrictive covenants was to "deny that the purchasers were black," and to require that plaintiffs prove the black racial origins of the defendants in order "to expose the irrational nature of the plaintiffs' assumptions about race during cross-examination"). This strategy was employed in *Sipes v. McGhee*, 25 N.W.2d 638, 641 (Mich. 1947), *rev'd*, 334 U.S. 1 (1948). In *Sipes*, "[t]he main factual issue [at trial] was with respect to the racial identity of the defendants." *Id.*

190. See Rose, *supra* note 11, at 204 (emphasis added).

In contrast, a sex offender covenant, much like its racially restrictive predecessors, concerns not the *use* of land, but *who* lives on it. The perceived enjoyment is not so much an outgrowth of the way land is used but of who resides there, and it reflects society's subjective norms concerning certain populations because of personal and largely immutable characteristics. Criminal status as a sex offender, much as race or ethnicity, often carries debilitating consequences, rightly or wrongly, that can last a lifetime.¹⁹¹ As Professor Rose notes, the fact that racially restrictive covenants did not directly concern land uses perhaps explains why courts largely skirted the touch and concern analysis.¹⁹²

Conversely, some may argue that beneficiaries directly benefit from a sex offender covenant because they and their children are safer. While this perception may appear intuitively correct, empirical evidence strongly suggests otherwise.¹⁹³ The greatest danger posed by specific convicted sex offenders who abuse children is from within, as upwards of ninety percent of individuals who commit sexual crimes against children are family members or acquaintances of the child.¹⁹⁴ Furthermore, convicted sex offenders have some of the lowest recidivism rates.¹⁹⁵ Finally, the universe of sex offenses and those who are tagged with the label—encompassing the eighteen-year-old teen who has consensual sex with his underage girlfriend, the mother whose fifteen-year-old daughter is impregnated by the child's live-in boyfriend, and the flasher¹⁹⁶—is large and ensnares a number of people who have neither committed offenses against children nor who are at risk to recidivate, much less against children.

The critical component of the enjoyment derived from a sex offender covenant, however, is not that a beneficiary *actually* may be safer, but that he *perceives* himself to be. The perception of enhanced safety may be the “enjoyment” derived from the benefit side of the touch and concern equation. The critical question in touch and concern analysis, however, is whether unsubstantiated perception satisfies the test, especially when a covenant has little connection to an actual use of land.¹⁹⁷ Arguably, racially restrictive covenants may have been similarly grounded in

191. *Smith*, 538 U.S. at 117 (Ginsburg, J., dissenting) (“However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.”).

192. Rose, *supra* note 11, at 203 (arguing that, with respect to racially restrictive covenants, “American courts glided over the issues that lay behind ‘touch and concern’”).

193. See *supra* notes 22-23 and accompanying text.

194. See *supra* note 22 and accompanying text.

195. See *supra* note 23 and accompanying text.

196. Tekle-Johnson, *supra* note 17, at 613 n.20; see also Sandberg, *supra* note 23 (noting that lifetime sex offender registration requirements, for example, “don’t distinguish dangerous predators from otherwise harmless men and women who foolishly had sex with underage lovers, served their sentences and don’t need a lifetime of public scrutiny”). The article relates the story of a convicted sex offender who appears on Texas’s lifetime sex offender registry because “he was convicted of sexually abusing a 16-year-old girl who was half his age,” but who is now his wife and the mother of his three children. Sandberg, *supra* note 23.

197. See *supra* notes 45-47 and accompanying text.

whites' unfounded fears that they would be criminally victimized by certain populations, especially blacks.¹⁹⁸ Ultimately, *Shelley* was an implicit repudiation of this concept—unsubstantiated fear by whites was not enough to restrain black residency using private means.¹⁹⁹ These unfounded perceptions of safety outweigh the marginal land value benefits on the benefit side of the touch and concern equation.²⁰⁰

B. REASONABLE RESTRAINT AGAINST ALIENATION

1. Class Size as a Measure²⁰¹

Mulligan v. Panther Valley Property Owner's Ass'n, a case in which a New Jersey appellate court upheld a covenant that banned all Tier III registrants from residing in a common interest community,²⁰² is particularly instructive regarding class size as a measure in the sex offender covenant context.²⁰³ As the court aptly observed, the covenant's practical effect was to restrict the plaintiff from selling her restricted home (assuming potential buyers wished only to reside in it and not to lease it) to only eighty out of the 8.4 million individuals residing in New Jersey.²⁰⁴ Consequently, the court held that the covenant could not "seriously be considered an unlawful restriction upon [the challenger's] right to sell or lease her home"²⁰⁵ because local conditions dictated that there was still a sizeable pool of potential purchasers, notwithstanding the restraint.²⁰⁶

198. See A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 533 (1990) (discussing instances in American jurisprudence when "prosecutors have tried to stimulate white jurors' fears that violent racial minorities would prey upon their families and communities" by appealing "to the general white stereotype of blacks as less controlled, and so more violent or more prone to crime than whites").

199. See *supra* notes 45-47 and accompanying text.

200. On the burden side, a restrictive covenant runs with the land when there is some relationship to the use and enjoyment of the covenantor's land. See NATELSON, *supra* note 4, at 52. As demonstrated by the benefit analysis, sex offender covenants bear little relationship to the use and enjoyment of land because they preclude who may live on land, not what use may be made of it.

201. See *supra* note 60.

202. See *Mulligan v. Panther Valley Prop. Owners Ass'n*, 766 A.2d 1186, 1188-89 (N.J. Super. Ct. App. Div. 2001).

203. See *Panther Valley Declaration*, *supra* note 3 (citing the subdivision of Panther Valley's sex offender covenant).

204. *Panther Valley*, 766 A.2d at 1192 (referencing the population of New Jersey from the 2000 Census).

205. *Id.*; see also Herman, *supra* note 24, at 173 ("The size of the class in *Panther Valley*, eighty people, seems so small in size as to not require the court to consider it a restraint on alienation rather than a permissible small number.").

206. On the other hand, another commentator has argued that, if national population numbers of sex offenders were taken into account, sex offender covenants, especially those that ban all sex offenders, would be unreasonable restraints on alienation. Herman, *supra* note 24, at 173. *Panther Valley* illustrates the tension between security and open-housing public policy norms underlying sex offender covenants. The court was clearly concerned with the public policy implications of these covenants if they were broadly adopted. See *infra* note 227 and accompanying text. Yet the regime at issue was narrowly tailored to restrain the residency of the most dangerous convicted sex offenders, limiting its policy implications. See *infra* note 226 and accompanying text.

Other factors, however, may weigh against concluding that many sex offender covenants are reasonable restraints on alienation. For example, many CICs, the neighborhoods likeliest to promulgate sex offender covenants, are built in suburban and exurban areas.²⁰⁷ For approximately the last decade, however, a structural adjustment has been occurring in favor of central cities to the detriment of suburban and exurban areas, such that the latter have been depreciating and the former appreciating in value.²⁰⁸ The result has led to a marked increase in affordability in the outlying areas where CICs are likeliest to be built.²⁰⁹ In addition, the combination of long commutes, lack of public transportation options, and the harbinger of \$4.00-a-gallon gasoline has exacerbated declines in values in these outlying areas.²¹⁰

Consequently, some experts have predicted that today's suburbs and exurbs will become tomorrow's ravaged inner cities, so common in the twentieth century.²¹¹ This geographic role reversal is most vividly on display in Paris, France, where the city proper is largely inhabited by the upper crust and ringed by brown and black belts of impoverished Arab

207. See *supra* note 5. Panther Valley is located approximately fifty-three miles from New York City, New York. Iris Park is located approximately thirty-eight miles from Atlanta, Georgia. Milwaukee Ridge is located approximately eight miles from downtown Lubbock, Texas.

208. Christopher B. Leinberger, *The Next Slum?*, ATLANTIC MONTHLY, Mar. 2008, at 71 ("A structural change [from the suburbs to the cities] is under way in the housing market—a major shift in the way many Americans want to live and work."); see generally *infra* notes 220-21 and accompanying text.

209. See Leinberger, *supra* note 208.

210. JOE CORTRIGHT, CEOs FOR CITIES, DRIVEN TO THE BRINK: HOW THE GAS PRICE SPIKE POPPED THE HOUSING BUBBLE AND DEVALUED THE SUBURBS, 1, 7 (2008), available at <http://www.ceosforcities.org/files/Driven%20to%20the%20Brink%20FINAL.pdf> (re-marking that a "tectonic shift" has occurred in housing demand from outlying areas to the inner cores as a result of increases in gasoline prices and stating that "[c]ities in Florida, the Southwest and a few cities in the industrial Midwest have seen some of the most severe declines" in housing values); Peter S. Goodman, *Fuel Prices Shift Math for Life in Far Suburbs*, N.Y. TIMES, June 25, 2008, at A18 (noting, for example, the precipitous decline in housing values in the Denver, Colorado, suburbs). Two out of three of these areas are those where CICs are likeliest to be built. Telephone Interview by Joely Stewart with Frank Ratham, *supra* note 14. An interesting question, though outside the scope of this Article, is whether these communities may be more or less likely to adopt sex offender covenants given their arguable vulnerability to residency by convicted sex offenders in the housing markets.

211. Goodman, *supra* note 210 (quoting Leinberger, *supra* note 208). Leinberger, an expert in urban land use, states that "[m]any low-density suburbs and McMansion subdivisions, including some that are lovely and affluent today, may become what inner cities became in the 1960s and '70s—slums characterized by poverty, crime and decay." Leinberger, *supra* note 208. However, the article further calls this version of events "apocalyptic," and also quotes other experts who describe this "gradual reordering" as a "reversion to the center." *Id.* One commentator notes that this phenomenon is already occurring in Los Angeles, calling it the "new archetype of metropolitan spatial segregation, in which poverty [and its attendant 'problems and pathologies'] is no longer concentrated in the central city but is suburbanizing, racing farther and farther out from the metropolitan center." EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA* 146 (1997).

and African communities.²¹²

These outlying areas may prove more attractive to convicted sex offenders, given their affordability and the presumption that this population is largely one of modest means.²¹³ On the other hand, it is conceivable that a time will come when this population is literally locked out of the one place where it can afford to reside in the face of (1) a growing sex offender covenant movement, (2) the rise in public residency restrictions, and (3) the highly charged atmosphere surrounding sex offenders. This prediction may be especially apt in jurisdictions where there are already broad public residency restrictions barring convicted sex offenders from living anywhere between 500 and 2,500 feet of a school, park, or other place where children are likely to gather. Already shut out of the city because of the higher density of publicly prohibited zones and relegated to cornfields, underpasses, dry river beds, and industrial areas,²¹⁴ convicted sex offenders may also be privately zoned out of the lower density suburbs and exurbs. Prospectively, therefore, sex offender covenants, especially those that ban all sex offenders regardless of original offense or future dangerousness, may arguably be unreasonable restraints on alienation after all.

2. *Duration as a Measure*

In addition to class size, the duration of a restriction has sometimes been considered in assessing its reasonableness on alienation.²¹⁵ Historically, the longer a restraint's effect, the more likely it was deemed a restraint on alienation.²¹⁶ On the other hand, the common law doctrine of

212. See Craig S. Smith, *Angry Immigrants Embroil France in Wider Riots*, N.Y. TIMES, Nov. 5, 2005, at A1 (describing the suburbs around Paris as "the French equivalent of America's inner cities").

213. There are no studies, either on a macro- or micro-level, which indicate the annual income of the convicted sex offender population. However, anecdotally, Sergeant Brick of the N.Y.P.D. Sex Crimes Division states that there is a large homeless population among registered sex offenders and estimates the majority of sex offenders earn below \$40,000 per year. Telephone Interview by Joely Stewart with Sergeant Brick, N.Y.P.D. Sex Crimes Division (Aug. 28, 2008). A study conducted by the Colorado Sex Offender Management Board indicated that among the sex offenders who participated in the study, 22.2% had not completed high school, 12.8% received a G.E.D., and 21.4% received a high school diploma. COLO. SEX OFFENDER MGMT. BD., REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 18 (2004), available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal.pdf. Although the study did not include information regarding salary, it indicated that 6.7% of the participants were working part-time and 15.1% were unemployed. *Id.*

214. See *supra* note 19 and accompanying text.

215. Bruce, *supra* note 13, at 712-13 ("All courts would probably hold that a total restraint upon alienation which is *unlimited in time* . . . is void" (emphasis added)); see also Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 158-59 (Cal. Dist. Ct. App. 1919) (finding that the reasoning in judicial precedent in which the doctrine prohibiting restraints on alienation was at issue "leads logically and inevitably to the conclusion that any restraint whatever on alienation, either as to persons or *time*, is void" (emphasis added)).

216. See Bruce, *supra* note 13, at 712-13 ("The weight of authority no doubt is to the effect that a total restraint on alienation, *for an unlimited time*, though to a limited class is also void." (emphasis added)).

changed conditions has been used to cure the infinite duration of a restraint as well as to upend restrictions that have outlived their purposefulness.²¹⁷ For instance, restrictions prohibiting the commercial use of property have been overturned when it became clear that the residential character of a neighborhood or its environs had given way to a more commercial character.²¹⁸ Similarly, some courts used the doctrine to strike down racially restrictive covenants prohibiting residency by blacks because neighboring black enclaves were bursting at the seams, spilling over into protected areas.²¹⁹

In the context of sex offender covenants, the doctrine of changed conditions, at first glance, may not yield nearly the same effect. While these personal covenants often endure indefinitely,²²⁰ criminal status as a sex offender is invisible to the naked eye, unlike race²²¹ and commercial character.²²²

At second glance, however, the principle of changed conditions appears to have the capacity to act as a bulwark against inappropriate sex offender covenants. For example, as the future portends increasing numbers of private sex offender covenants and their public counterparts, it is plausible that courts may invoke the doctrine to stem the tide of sex offender legislation. Recognizing that, in many jurisdictions, convicted sex offenders, irrespective of offense and future dangerousness, will have fewer and fewer housing options, possibly compromising their ability to work and sustain a normal life, in addition to public safety,²²³ courts may invoke a more creative, less concrete interpretation of the doctrine.

217. Epstein, *supra* note 171, at 1364 (“[U]nder a unified theory of servitudes, courts must retain some residual power to set aside, even between the original parties, those encumbrances that over time prove obsolete, costly, or wasteful.” (citing Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1313, 1316-18 (1982); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1258-59 (1982))); *see also* Robinson, *supra* note 106, at 546 (describing the changed conditions doctrine as “simple and succinct: when conditions have so changed since the making of the covenant that it is no longer possible to secure in substantial measure the benefits originally contemplated, the covenant is unenforceable”).

218. *Contra* W. Land Co. v. Truskolaski, 495 P.2d. 624, 625 (Nev. 1972) (enforcing a covenant that restricted a subdivision to single-family dwellings notwithstanding the defendant’s claim that “the subdivision had so radically changed” that the purpose of the covenant was nullified, and holding that “the changes that have occurred since 1941 are not so great as to make it inequitable or oppressive to restrict the property to single-family residential use”).

219. *See, e.g.,* Fairchild v. Raines, 151 P.2d 260, 266-67 (Cal. 1944) (denying injunctive relief to halt the use and occupation of property by black individuals who were prohibited from living on the parcel by racially restrictive covenants prohibiting residence by black individuals because black and Mexican-American occupation of the surrounding area had increased and, thus, residential conditions supporting the need for the covenants had changed).

220. *See supra* note 58.

221. *See supra* note 189 and accompanying text.

222. *See Truskolaski*, 495 P.2d at 626 (stating that the changed conditions doctrine includes an increase in population, an increase in traffic, and an increase in commercial development where the city “condemned 1.04 acres of land on the edge of the subdivision . . . [that] now is the major east-west artery through the southern portion of the city” across from a restaurant and shopping center).

223. *See supra* notes 19-20.

Under this interpretation, conditions will have changed to such an extent—albeit not as openly and visibly—that individual neighborhoods alongside the state will have effectively rendered convicted sex offenders homeless.

C. THE RULE OF REASONABLENESS

1. Sex Offender Covenants Generally

The reasonableness of original sex offender covenants ultimately may depend on three factors: their (1) expansiveness, (2) duration, and (3) consequent public policy implications.²²⁴ For instance, although the sex offender covenants at issue in *Panther Valley* were subsequently added to the community's original declarations,²²⁵ they are nonetheless instructive. These covenants proscribed only the residency of the most dangerous sex offenders, effectively foreclosing housing opportunities for only approximately eighty individuals in New Jersey.²²⁶ Therefore, the reach of the covenants was limited and likely would not have significantly impacted housing opportunities for many sex offenders, an important public policy concern with which the *Panther Valley* court appeared to struggle.²²⁷

In addition, although the covenants endured for life, they were arguably reasonable because they barred only the most dangerous sex offenders, and the security and safety of neighbors in the community was therefore more compromised. Further, at least one commentator has paralleled the justifications for public residency restrictions and their private counterparts, arguing that if blanket and lifetime public residency restrictions are upheld because they are perceived to have a regulatory intent,²²⁸ then private restrictions are similarly reasonable.²²⁹

224. Herman, *supra* note 24, at 171, 176 (positing that, with respect to sex offender covenants, "[t]he seeming reasonableness must still be considered in the light of the duration and size of the restricted class").

225. *Mulligan v. Panther Valley Prop. Owners Ass'n*, 766 A.2d 1186, 1189 (N.J. Super. Ct. App. Div. 2001).

226. *Id.* at 1192. While agreeing that the covenants could be measured for their reasonableness, the court in *Panther Valley* declined to accord these covenants a "very strong presumption of validity" because they were not original restrictions. *Id.* at 1191 (citing *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981)). The court appeared to consider public policy concerns, the applicable test being whether the covenants are "reasonably related to the promotion of the health, happiness and peace of mind." See *Hidden Harbour*, 393 So. 2d at 640.

227. *Panther Valley*, 766 A.2d at 1193 ("Common interest communities fill a particular need in the housing market but they also pose unique problems for those who remain outside their gates, whether voluntarily or by economic necessity. The understandable desire of individuals to protect themselves and their families from some of the ravages of modern society and thus reside within such communities should not become a vehicle to ensure that those problems remain the burden of those least able to afford a viable solution.").

228. Tekle-Johnson, *supra* note 17, at 625 n.82 (discussing that some courts have upheld public sex offender residency restrictions by determining that the restrictions are civil and regulatory in nature rather than punitive).

229. Herman, *supra* note 24, at 175 ("In enacting a total ban on sex offenders near schools, the state was found to have legitimate reasons for its actions. A rough parallel can be drawn to the overall issue of reasonableness with private communities. If the state can

Taken in isolation, almost any sex offender covenant, especially one which limits its bans only to the most dangerous of sex offenders, such as pedophiles and rapists of adult women, would likely be reasonable.²³⁰ On the other hand, the public policy ramifications of sex offender covenants weigh against their reasonableness, especially as they increase in popularity and expand to ban *all* sex offenders for life, irrespective of propensity to re-offend or the nature of the crime.²³¹

Where is this population to reside if they are banned from areas both publicly and privately? Is society endangering itself by marginalizing convicted sex offenders to this degree?²³² Further compromising the case for the reasonableness of sex offender covenants writ large is empirical evidence showing not only that convicted sex offenders are among the least likely to recidivate among offender populations,²³³ but also that the greatest danger of child sexual abuse is posed by family members or acquaintances of the child.²³⁴ On the other hand, the rule of reasonableness would likely uphold narrowly-tailored sex offender covenants banning the residency of the most dangerous sex offenders, such as those at issue in *Panther Valley*—those who are most risk to re-offend for the most dangerous sexual crimes.²³⁵

D. PUBLIC POLICY

Courts have used public policy to invalidate or sustain restrictive covenants,²³⁶ a phenomenon paralleled in contract law.²³⁷ Public policy is particularly relevant in the law of restrictive covenants, given that they are the nexus of real property and contract.²³⁸

justifiably regulate sex offenders, then it would seem reasonable that a private community could do the same because it would have a similar interest in protecting its members.”).

230. See *supra* note 27 and accompanying text.

231. See *supra* note 3 (detailing examples of original sex offender covenants fitting this criteria); see also Sandberg, *supra* note 23 (noting that similar distinctions are not made in public sex offender restrictions).

232. See *supra* notes 19-20 and accompanying text; see also Vick, *supra* note 17 (quoting the California Sex Offender Management Board’s December 2008 report with respect to public residency restrictions and, by analogy, their private counterparts as saying, “Common sense leads to the conclusion that a community cannot be safer when sex offenders are homeless”).

233. See *supra* note 23.

234. See *supra* note 22.

235. See, e.g., *Mulligan v. Panther Valley Prop. Owners Ass’n*, 766 A.2d 1186, 1189 (N.J. Super. Ct. App. Div. 2001).

236. See *supra* notes 140-58 and accompanying text.

237. Shelley Ross Saxer, *Shelley v. Kraemer’s Fiftieth Anniversary: “A Time for Keeping; A Time for Throwing Away”?*, 47 U. KAN. L. REV. 61, 103 (1998) (“Contract law principles commonly employ public policy concerns to find certain bargains unenforceable. Whether a contract is against public policy is a question of law that the court determines based on the facts and circumstances of each case.”).

238. *Id.* (“Although real covenants are interests in land, they are created by contractual promises about the use of land.”); see also Ellickson, *supra* note 80, at 1526-27 (describing the declaration of covenants in many homeowners associations as governed by “familiar principles of contract law”).

In the only case to examine sex offender covenants, the *Panther Valley* court wrestled with the notion that a surfeit of these covenants would run afoul of open-housing public policy norms—in this context, to provide safe and decent housing to convicted sex offenders.²³⁹ This issue will only gain in importance as sex offender covenants of indefinite duration and public residency regimes that indefinitely restrict housing access irrespective of a convicted sex offender's future dangerousness or original crime increase in popularity.

While advocates of overbroad public and private sex offender restrictions may argue that these regimes are socially beneficial in the belief that *all* convicted sex offenders pose a *perpetual* danger to children,²⁴⁰ as a practical matter, these blanket regimes may actually compromise public safety.²⁴¹ The push to isolate almost all convicted sex offenders, regardless of recidivism risk or the original crime, may serve to incentivize recidivistic behaviors in a population that is one of the least likely to re-offend, thereby endangering public safety and defeating the original intent of these private and public schemes.²⁴² Moreover, since “the vast majority [of sex offenders] are neither imprisoned for life nor condemned to death,” our society implicitly acknowledges that they merit a place (and space) in society.²⁴³ Yet, many of these public and private regimes unwittingly send an opposing message. Finally, the relentless and increasingly harsh focus on convicted sex offenders diverts society's and public policy's attention from the population that uncomfortably poses the greatest risk in sheer numbers to children's bodily sanctity: family members and friends.²⁴⁴

E. MORE LIKE RACE OR MORE LIKE AGE?

In their public policy effects, are sex offender covenants more like race, disability, and quasi-religious covenants, or more like those impacting age and pet ownership? While courts have used public policy to strike down race- and disability-based covenants, they have used it, with few exceptions, to uphold age and pet covenants.²⁴⁵

In the racial covenant cases, the driving public policy concern was access to safe and decent housing for restricted populations, especially individuals of African descent.²⁴⁶ In the disability covenant cases, access to a *certain kind of housing* by the restricted group that would normalize and

239. See *Panther Valley*, 766 A.2d at 1193.

240. See Herman, *supra* note 24, at 167-68, 191.

241. See Tekle-Johnson, *supra* note 17, at 607.

242. See *supra* notes 20, 23 (regarding incentives to re-offend and empirical comparisons to other offender populations, respectively).

243. See Tekle-Johnson, *supra* note 17, at 642.

244. See *supra* note 22.

245. See *supra* notes 142-55 (using public policy to strike down race and disability covenants), 156-58 (upholding age covenants), 125-26 (upholding pet covenants as reasonable), 170 (noting that the reasonableness of a restriction ultimately depends on whether it conforms to public policy).

246. See *supra* notes 152-55 and accompanying text.

mainstream them was the dominant public policy factor.²⁴⁷ On the other hand, in the age restriction cases, *access to housing by the restricting group*, as opposed to the restricted group of younger members of society, was the overriding public policy concern of many courts.²⁴⁸

In the sex offender context, courts seem, at first glance, to be less concerned with housing access by the restricting group, or non-sex offenders, given that this population is not limited in the housing market. Moreover, because many convicted sex offenders are not institutionalized but are instead implicitly given the opportunity to integrate into society through parole and probation, unlike past practices with respect to the mentally challenged, access to mainstreamed housing is likely not as grave a public policy concern. Rather, the largest public policy concern is simply access to safe and decent housing, as was the case in many of the race covenant cases.²⁴⁹ Arguably, the ghettos of yesterday are the underpasses of today.²⁵⁰

On the other hand, it is difficult to make the case that private residency regimes on sex offenders, in tandem with their public counterparts, are responsible for convicted sex offenders' limited housing opportunities. Indeed, a credible question is whether, in the absence of these covenants, many convicted sex offenders would even choose, let alone be able to afford, to reside in these privately governed communities.

This Article argues that, while the answer to this question lies decisively in the future, current trends forecast the continued devaluation of many low-density suburban and exurban areas, exacerbated by high gasoline prices and commuting costs.²⁵¹ These areas are the most likely to be regulated by private-covenant regimes, such as those banning sex offenders.²⁵²

CICs also comprise the majority of new housing stock in the United States, and they are increasingly the rule rather than the exception.²⁵³ Unlike in previous decades, where these developments were enclaves of the wealthy, today they encompass the most affordable housing option for many.²⁵⁴ In the face of increasingly popular public and private land-use regimes that zone out convicted sex offenders, these communities may provide the most affordable and livable housing for this population as well.²⁵⁵

247. See *supra* note 151 and accompanying text.

248. See *supra* notes 156-58 and accompanying text.

249. See Vick, *supra* note 17.

250. See *Sex Offenders Living Under Miami Bridge*, N.Y. TIMES, Apr. 8, 2007, at 22 (detailing the plight of five convicted sex offenders forced to live under a highway bridge because they were unable to find housing as a consequence of public residency restrictions).

251. See *supra* notes 208-12 and accompanying text.

252. See Tekle-Johnson, *supra* note 17, at 610, 612-13.

253. See *supra* note 14.

254. See *supra* note 15.

255. The issue of sex offender covenants differs markedly from the more general issue of zoning and deed restrictions on halfway houses for non-violent and violent ex-offenders. See, e.g., *Bannum, Inc. v. City of St. Charles*, 2 F.3d 267, 268-71 (8th Cir. 1993) (upholding

Given this reality, however, should not these communities be permitted to arm themselves with the restrictive covenant against the dangers posed by convicted sex offenders, though fairness dictates that the social costs of housing this population be borne collectively?²⁵⁶ This is a fair question, and it could have been similarly posed in previous years by private residential communities pushed to house individuals of African, Mexican, Chinese, and Japanese descent, as well as those with mental disabilities.

III. WHAT LIES BENEATH: PARALLELS IN RACIAL SEGREGATION

Underlying sex offender covenants and their public analogues is a fear that convicted sex offenders will prey on children, which, in turn, produces an accompanying desire to assuage this fear as much as possible.²⁵⁷ Fear is an important basis for regulation. For example, underlying fears for consumer safety have prompted important safety and consumer protections in the manufacture of food, drugs, toys, and automobiles.²⁵⁸

Unfounded fear, however, is an entirely different matter that leaves little room for nuance in the wake of a highly charged and easily manipulated emotional climate. The current environment surrounding convicted sex offenders, who, on the whole, are among the least likely ex-offenders to re-offend,²⁵⁹ is one that largely makes little or no distinction between the least and the most dangerous sex offenders, or between those who have violently sexually abused children and those who have not.²⁶⁰ Yet public and private legislators have not been moved to respond in quite the same way to the dangers posed by other offenders guilty of more proximate, and arguably more heinous, crimes such as murder, serial battery, and car-jacking.²⁶¹

zoning on halfway houses for ex-offenders). *But see* *Nicholson v. Conn. Half-Way House, Inc.*, 218 A.2d 383, 384, 386 (Conn. 1966) (striking down restrictions on halfway houses for violent offenders). First, restrictions on halfway houses involve the clustering of ex-offenders generally, whereas sex offender covenants comprehend restrictions on individual sex offenders (although, in theory, groups of sex offenders could live together). Restrictions on ex-offenders in halfway houses, however, merit a far different debate from restrictions on individuals, given that underlying the former may be a concern with any deleterious effects of the concentration of ex-criminal offenders. More particularly, recidivism rates for sex offenders are generally lower than those for other criminal offenders. *See* Sandberg, *supra* note 23. Finally, this Article supports restrictions on the most dangerous convicted sex offenders, mirroring the potential motivations of public and private zoning of halfway houses for ex-felons. *See supra* note 27.

256. *See* Guernsey, *supra* note 144, at 424 (applying the question to group homes for mentally disabled individuals and noting that "[p]roperty owners also argue that they should not have to bear individually a cost that society should bear collectively").

257. *See* Tekle-Johnson, *supra* note 17, at 607, 610-11.

258. *See* Stanton Phillip Beck, Comment, *Enhanced Injury: A Direction for Washington*, 61 WASH. L. REV. 571, 592 (1986) (discussing the idea that societal interests shape consumer protection laws and stating that "[l]iability is imposed upon manufacturers in the hope that it will promote the design of safer products and thereby afford consumers the maximum protection from hazardous designs").

259. *See* Sandberg, *supra* note 23.

260. *Id.*

261. *See* Strahilevitz, *supra* note 16, at 1887.

Society has already seen this kind of unsubstantiated, sexually-predicated fear that, when harnessed, has served to exclude and marginalize vast swaths of the populace.²⁶² Nowhere was this type of fear more on display than in the days of legally and socially sanctioned racial segregation.²⁶³ In that era, private and public racial segregation practices were human-zoning schemes designed to ensure that the infantilized white woman, and to a lesser extent her male counterpart, were kept safe from this country's original sex offenders, the black man, and to a lesser extent, the black woman.²⁶⁴

Representative of segregation's image of the sexual predator was Emmett Till, the fourteen-year-old black boy from Chicago's South Side who, on a summer visit to relatives in Mississippi, was charged with whistling at an older white woman in public, a violation of the South's social code at the time.²⁶⁵ Three days later, his deformed body was discovered at the bottom of the Tallahatchie River with a seventy-five-pound cotton gin fan tied around his neck.²⁶⁶

The safety of white people—analogue to children in today's sex offender debate—from black individuals was meant to be assured in relatively physically intimate and potentially sexually charged (or explosive?) settings: neighborhoods, water fountains, restrooms, swimming pools, trains, schools, and even the marital bedroom.²⁶⁷ In all of these spaces, the body was on display, and its fluids could easily be transferred or ab-

262. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND RE-SUMPTIONS OF THE AMERICAN LEGAL PROCESS* 42-43 (1996).

263. *Id.*

264. The analogy is that white individuals, particularly women, are the equivalent of the vulnerable children at risk of danger in today's modern sex offender debate, and black persons, particularly men, are analogous to today's dangerous sexual predators. See *White v. State*, 137 Tex. Crim. 481, 482-84, 131 S.W.2d 968, 968-70 (1939) (per curiam) (overturning the conviction of a black man for assault with intent to rape a white woman for evidentiary reasons, but emphasizing that "white women in this part of the United States do not willingly submit to sexual intercourse with negroes, whatever may be their conduct in other parts, and when a negro expresses a desire for sexual intercourse with a white woman, it leads to the conclusion that he entertains a criminal intent, only awaiting an opportunity for the intended assault"); HIGGINBOTHAM, *supra* note 262, at 42 (noting that one of the two dominant myths concerning black sexuality was that black men and women were "threatening creatures who have the potential for sexual power over whites: . . . [t]here is Jezebel (the seductive temptress), Sapphire (the evil, manipulative bitch) . . . Bigger Thomas (the mad and mean predatory craver of white women), [and] Jack Johnson (the super performer—be it in athletics, entertainment, or sex)" (citing CORNEL WEST, *RACE MATTERS* 83 (1993))).

265. See *The Law: Trial by Jury*, TIME MAG., Oct. 3, 1955, at 18-19.

266. *Id.*

267. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 42 (1978) ("As recently as 1967 more than sixteen states prohibited and punished interracial marriages . . ."); see also Donald Q. Cochran, *Ghosts of Alabama: The Prosecution of Bobby Frank Cherry for the Bombing of the Sixteenth Street Baptist Church*, 12 MICH. J. RACE & L. 1, 2 (2006) (describing segregation in Birmingham, Alabama, as very strict in that "[n]early all public facilities in Birmingham, including theaters, bus stations, parks, lunch counters, restrooms, and water fountains, were segregated by race"). The idea for "racial space" stems from a talk given by Professor Elise Boddie at the Black Female Faculty Summer Writing Workshop entitled *Racialized Space* on June 27, 2008, at the University of Denver Sturm College of Law.

sorbed. Another perceived danger was the potential for social interactions that would break down racial barriers (oh, that person really is nice!), which, in turn, could potentially foster the breaking down of more physical walls, leading to the ultimate sexual transgression—mixed-race babies.²⁶⁸

In the private sphere, this zoning was enforced and maintained via the pre-*Shelley* restrictive covenant, but also by cultural norms and social traditions requiring separate arenas in the more private parts of life—home, worship, and social clubs. Underlying this private and public racial zoning was what is triggering today's private and public sex offender zoning in similar venues: an unsubstantiated fear that a certain population, be it persons of African descent or almost any convicted sex offender no matter his original crime or future risk of dangerousness, will sexually violate society's most vulnerable beings, whites in the days of Jim Crow and children now. The results of these acts are intolerable sexual transgressions—interracial sex and mixed-race children in the case of an era long past and the sexual abuse of children today.

A. HISTORY'S ANSWERS

The history of racial segregation suggests, however, that blanket public and private restrictions on an entire population are not wholly effective²⁶⁹ and result in a cauldron of grievances that overflow into radical and revolutionary change.²⁷⁰ On the other hand, some of the solutions employed to deal with the sex offender problem posed by black men in the era of segregation merit serious discussion in light of today's sex offender debate.

For instance, is the vigilantism espoused by the Emmett Till approach an appropriate answer?²⁷¹ While this reference may be extreme, it may

268. See HIGGINBOTHAM, *supra* note 262, at 45 ("During the 1960s, the question whites often used to end any discussion about integration was: 'Yes, but would you want your daughter or sister to marry one?' The key as to why the mere posing of this question was always such a powerful argument (to whites) against integration can be found buried in the slave codes. One would not want one's (white) sister to marry a black because her husband would be an inferior being who would subject her to his inferior urges, and would produce inferior children."); Bruce, *supra* note 13, at 706 ("The natural law which forbids [the intermarriage of blacks and whites] and their social amalgamation [even on local public transportation], which leads to a corruption of races, is as clearly divine as that which imparts to them different natures. The tendency of intimate social intermixture is to amalgamation contrary to the law of races. . . . From social amalgamation it is but a step to illicit intercourse and but another to intermarriage." (citing *W. Chester Ry. Co. v. Miles*, 55 Pa. 209 (Pa. 1867))).

269. For instance, blacks and whites did not stop loving one another. See *Loving v. Virginia*, 388 U.S. 1, 1-3 (1967). Further, the baby boom of mixed-race babies born during and immediately following the Civil Rights Movement is a testament to this ineffectiveness. *Interracial Baby Boom*, THE FUTURIST, May 1, 1993, available at <http://allbusiness.com/professional-scientific/scientific-research/369759-1.html>. Indeed, one of these babies, Barack Obama, grew up to be President of the United States.

270. The reference here is to the Civil Rights Movement, which arguably inspired a whole host of other movements for civil rights for other aggrieved populations—women, Chicanos, the disabled, the LGBT community, etc.

271. See *supra* notes 265-66 and accompanying text.

be accurate to say that the zeitgeist prizes retribution over safety in light of the wave of public and private residency regimes that are cumulatively marginalizing convicted sex offenders, irrespective of their original offense or future dangerousness.²⁷² On the other hand, it is probably safe to say that the Emmett Till approach would inspire moral and legal revulsion, even to a population as universally despised as convicted sex offenders. Just as Emmett Till's slaying aroused the nation's disgust at racial segregation and the unfounded fears behind it,²⁷³ the likely aversion of this approach to convicted sex offenders suggests there are limits, reflected in public policy and social norms, to society's increasingly harsh restraints against even this population.

Reflective of a more egalitarian approach, how about expanding public and private sex offender schemes to include all ex-criminal offenders, or at least those who are more likely to re-offend and who are guilty of more proximate crimes? While these regimes would not solve the problems created by the sex offender schemes, they would go a long way toward equalizing their effects and highlighting the problems created when huge segments of the population are denied housing. The schemes would also create awareness of the social costs involved with shifting the housing burden onto communities who have not enacted these zoning mechanisms. On the other hand, the breadth of this zoning scheme would likely make it utterly impractical.

In contrast, rational discourse suggests that there are more narrowly tailored and effective solutions that may work either in tandem with or in lieu of overbroad private sex offender residency regimes, given that the state neither "imprison[s] for life nor condemn[s] to death" many sex offenders, who have lower recidivism rates.²⁷⁴ One such solution is that which was popular in the *status quo ante*—individualized residency restrictions, set by a court or a probation or parole officer for a convicted sex offender, which take into account each sex offender's original crimes and/or propensity to re-offend.²⁷⁵ A second approach involves publicly zoning the most dangerous convicted sex offenders to accessible parts of the city as part of a Sex Offender Containment Zone (SOCZ), where the sex offenders may take advantage of comprehensive treatment, supervi-

272. See Vick, *supra* note 17 (noting that Proposition 83, California's public sex offender residency regime, "passed by a wide margin that reflected the powerful public emotion that experts and law enforcement officials say in this instance trumped sound policy").

273. See Steven Hartwell, *Humor, Anger, Rules, and Rituals*, 13 CLINICAL L. REV. 327, 369 (2006) (describing how the murder of Emmett Till "created a national and then international media event" and also spurred public "outrage" that contributed to the "eventual enactment of the Civil Rights Act of 1964").

274. See Tekle-Johnson, *supra* note 17, at 642.

275. See, e.g., N.J. STAT. ANN. § 2C:7-8 (West 2005) (setting forth comprehensive guidelines that "identify factors relevant to risk of re-offense" and provides for "levels of notification depending upon the degree of the risk of re-offense"); WASH. REV. CODE ANN. § 71.09.020 (West 2008) (basing an individual's classification as a sexually violent predator on prior conviction and predicted future propensity to perform "predatory acts of sexual violence").

sion, and accountability.²⁷⁶ Still, if children's safety and security are the aim, both of these proposed solutions are lacking, given that the family members and acquaintances of victimized children commit over ninety percent of incidents of sexual abuse of children.²⁷⁷ Large-scale public health campaigns must educate children and their families, teachers, caretakers, and care providers about these dangers and raise awareness of the sexual abuse of this very vulnerable population and their likeliest predators.²⁷⁸

CONCLUSION

Sex offender covenants are the latest wave in sex offender legislation ostensibly designed to secure the safety of families, and especially children, from the dangers posed by convicted sex offenders. The problem is that, like their public counterparts, many of these private regimes are dangerously over inclusive and incentivize the same recidivistic behavior they were designed to prevent. Another hitch is that they distract from the largest population of perpetrators of child sexual abuse—family members and friends. Further, they shunt the social costs of dealing with convicted sex offenders to other communities, allowing some the luxury of opting out.

The examination of “who” covenants based on race, age, disability, pet-ownership status, and quasi-religious affiliation under common law property rules suggests that the common law is ultimately concerned with whether these highly personal covenants conform to public policy. As illustrated by the effects of their racial progenitors in the era of racial segregation, public policy may well recognize that a surfeit of overbroad sex offender covenants, in tandem with the rise of their public counterparts and the highly charged atmosphere surrounding sex offenders, may foreclose housing opportunities and imperil this population and the broader public.

276. Tekle-Johnson, *supra* note 17, at 615, 642, 662-63 (proposing the SOCZ and concluding that it would not violate the federal Ex Post Facto Clause, unlike many public residency sex offender schemes).

277. *Id.* at 607.

278. *Id.* at 650.

Essay

